(4)

No. 96-8837

In The

Supreme Court of the United States

October Term, 1997

DONALD E. CLEVELAND
ENRIQUE GRAY-SANTANA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

JOINT APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. 94-10292-REK
v.	)	
JUAN RODRIGUEZ RAMON E. VASQUEZ ENRIQUE A. GRAY DONALD E. CLEVELAND	)	VIOLATIONS: 21 U.S.C. § 846 – Conspiracy 21 U.S.C. § 841(a)(1) – Possession With Intent to Distribute 21 U.S.C. § 846 – Attempt to Possess With Intent To Distribute 18 U.S.C. § 924(c)(1) – Carrying And Using A Firearm During And In Relation To A Drug Trafficking Crime 18 U.S.C. § 924(c)(1) – Carrying And Using A Firearm During And In Relation To A Drug Trafficking Crime 18 U.S.C. § 2 – Aiding And Abetting

SECOND SUPERSEDING INDICTMENT

COUNT ONE: (21 U.S.C. §846 – Conspiracy to Possess Cocaine with Intent to Distribute)

The Grand Jury charges that:

On or about October 18, 1994, in Boston, in the District of Massachusetts, in the District of Connecticut, and elsewhere

JUAN RODRIGUEZ
RAMON E. VASQUEZ
ENRIQUE A. GRAY
DONALD E. CLEVELAND

defendants herein, did knowingly and intentionally combine, conspire, confederate and agree with each other to commit an offense against the United States, namely: knowingly and intentionally to possess with intent to distribute a quantity of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Section 846.

COUNT TWO: (21 U.S.C. §841 – Possession of Cocaine with Intent to Distribute)

The Grand Jury further charges that:

On or about October 18, 1994, in Boston, in the District of Massachusetts, in the District of Connecticut, and elsewhere

JUAN RODRIGUEZ
RAMON E. VASQUEZ

defendants herein, in furtherance of the conspiracy set forth in Count One of this Indictment, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

COUNT THREE: **(21 U.S.C. §846 – Attempt to Possess Cocaine with Intent to Distribute)**

The Grand Jury further charges that:

On or about October 18, 1994, in Boston, in the District of Massachusetts, and elsewhere

DONALD E. CLEVELAND
ENRIQUE A. GRAY

defendants herein, did knowingly and intentionally attempt to possess with intent to distribute a quantity of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of 21 U.S.C. § 846 and 18 U.S.C. § 2.

NOTICE OF APPLICABILITY OF 21 U.S.C. §841(b)(1)(A)(ii)

The crimes described in Counts One, Two and Three of this Indictment involved five or more kilograms of cocaine. Accordingly, Title 21, United States Code, Section 841(b)(1)(A)(ii) applies to these counts.

COUNT FOUR: **(Title 18 U.S.C. §924(c)(1) – Carrying and Using A Firearm During And In Relation To A Drug Trafficking Crime)**

The Grand Jury further charges that:

On or about October 18, 1994, in Boston, in the District of Massachusetts,

DONALD E. CLEVELAND

defendant herein, did knowingly and intentionally use and carry a firearm, to wit: a Sig Sauer, model P-220, .45 caliber pistol bearing serial number G203454; a Taurus .357 caliber magnum revolver bearing serial number HL106626; and a Taurus, model PT 92 AF, 9 millimeter pistol bearing serial number L89154, during and in relation to the drug trafficking crime alleged in Count Three of this Indictment, to wit: attempt to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846.

All in violation 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2.

COUNT FIVE: **(Title 18 U.S.C. §924(c)(1) – Carrying and Using A Firearm During And In Relation To A Drug Trafficking Crime)**

The Grand Jury further charges that:

On or about October 18, 1994, in Boston, in the District of Massachusetts,

ENRIQUE A. GRAY

defendant herein, did knowingly and intentionally use and carry a firearm, to wit: a Sig Sauer, model P-220, .45 caliber pistol bearing serial number G203454; a Taurus .357 caliber magnum revolver bearing serial number HL106626; and a Taurus, model PT 92 AF, 9 millimeter pistol bearing serial number L89154, during and in relation to the drug trafficking crime alleged in Count Three of this Indictment, to wit: attempt to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846.

All in violation 18 U.S.C. § 924(c)(1) and 18 U.S.C. § 2.

A TRUE BILL

/s/ Catherine Mancini
FOREPERSON OF THE
GRAND JURY

/s/ Illegible
ASSISTANT U.S. ATTORNEY

DISTRICT OF MASSACHUSETTS: ~~December~~, ~~1994~~ March 15, 1995, @ 1:40 p.m.

Returned into the District Court by Grand Jurors and filed.

/s/ Ruth A. Welch
DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

****

UNITED STATES OF AMERICA
v.
DONALD CLEVELAND

CR-94-10292-REK

July 17, 1995
Boston, MA

****

COMPLETE TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ROBERT E. KEETON

Appearances:

For the Government: Jeffrey A. Locke, Esq.

For the Defendant: John Cunha, Esq.

Court Reporter: Susan J. Lamoureux
Official Court Reporter
U.S. District Court
450 Main Street
Hartford, Connecticut 06103
(860) 246-0750

Proceedings recorded by mechanical stenography, transcript produced by computer-aided-transcription.

[5] THE COURT: All right. Follow along as I call your attention to the fact that in count three the Grand Jury charges that on or about October 18th, 1994 in Boston, in the District of Massachusetts and elsewhere, you and Enrique Gray did knowingly and intentionally attempt to possess with intent to distribute a quantity of cocaine, a Schedule II controlled substance, in violation of

Title 21, United States Code, Section 841(a)(1), all in violation of 21, United States Code, Section 846 and 18, United States Code, Section 2. Do you feel that you fully understand that charge against you?

THE DEFENDANT: Yes, sir.

THE COURT: And then following that is a notice [6] of applicability of 21, United States Code, Section 841(b)(1)(A)(2), calling attention to the fact that the crimes described in counts one and two which are not applicable at the present hearing, but also count three, the one that we've just talked about, involved five or more kilograms of cocaine, and accordingly Title 21, United States Code, Section 841(b)(1)(A)(2) applies to these counts. You understand that charge?

THE DEFENDANT: Yes, sir, I do, sir.

THE COURT: And then count four charges that on or about October 18th, 1994 in Boston, in the District of Massachusetts, you did knowingly and intentionally use and carry a firearm, to wit, a SIG-Sauer Model P-220 .45 caliber pistol bearing serial number G203454; a Taurus .357 caliber magnum revolver bearing serial number HL106626; and a Taurus model ET92AF nine millimeter pistol bearing serial number L89 154, during and in relation to the drug trafficking crime alleged in count three of this indictment, to wit, attempt to possess cocaine with intent to distribute in violation of 21, United States Code, Section 846, all in violation of 18, United States Code, Section 924(c)(1) and 18, United States Code, Section 2. Do you feel that you fully understand that charge?

THE DEFENDANT: Yes, I do, sir.

* * *

[12] THE COURT: All right. Now, I am going to ask the Government to summarize the evidence that would be offered against you if the case were tried.

You may be seated while that summary is given. [13] I will ask you to listen carefully to the summary because I will then want to ask you whether you agree that you did the things that are said to be your acts in the summary of the evidence.

You may proceed, Mr. Locke.

MR. LOCKE: Thank you your Honor.

Your Honor, were this case to proceed to trial, the Government would offer evidence to establish the following facts. The Government would show, your Honor, that during the early afternoon of October 18th, 1994, agents from the Drug Enforcement Administration as well as local police departments that were tasked to the DEA conducted an investigation in the State of Connecticut, focusing on an apartment complex in Rocky Hill, Connecticut, where they were conducting a long-term cocaine trafficking investigation of an individual named Juan Pagan. During the course of that investigation they observed several vehicles arrive at that apartment complex, containing individuals later determined to include a William Acosta, Ramon Vasquez, and a Juan Rodriguez. Continuing with their surveillance, they observed Mr. Vasquez and Rodriguez leave with yet another individual in an automobile. At the same time they observed Mr. Acosta associating with the suspected drug trafficker, Juan Pagan. After a passage of approximately [14] an

hour and 20 minutes or thereabouts, agents observed Vasquez and Rodriguez return to the apartment complex. Mr. Rodriguez at that time was driving a white Isuzu Trooper.

The Government would show, your Honor, that agents had previously received information about Jaun Pagan's use of a white Isuzu Trooper to transport and conceal cocaine, and had also determined and through information that there was a compartment inside that vehicle.

The Government would show, your Honor, that shortly after the return of Mr. Rodriguez with the white Trooper, Mr. Acosta departed Mr. Pagan's apartment, came downstairs, met with Vasquez and Rodriguez and then proceeded to drive to Boston.

The Government would show that Acosta's common law wife, Mr. Vasquez rode in one automobile and drove primarily in tandem with Mr. Rodriguez who was driving this white Isuzu Trooper. The Government would further show that the vehicles were followed ultimately from Connecticut to Boston and to the Symphony Hall section of Boston where the two vehicles stopped on St. Stephen's Street.

The Government would show, your Honor, that agents then observed activities by Mr. Vasquez and [15] Mr. Rodriguez consistent with efforts to observe whether or not they were being observed or detected by law enforcement agents. Surveillance agents in Boston then observed a Mazda automobile, Mazda 929 4-door sedan, in the vicinity of Symphony Hall with two occupants. The driver of that car was Mr. Cleveland, this defendant,

Donald Cleveland. The passenger was Enrique Gray. Agents observed Mr. Cleveland and Mr. Gray conversing first with William Acosta, the individual who traveled from Connecticut. Ultimately agents observed Gray and Cleveland get back into the Mazda and proceed to follow Mr. Acosta around Symphony Hall in the direction of St. Stephen's Street. Shortly thereafter agents again observed the Mazda, still with Mr. Cleveland driving it, Mr. Gray as a passenger and at this time observed Ramon Vasquez, the individual from Connecticut, now in the rear seat of that Mazda. They then observed the Mazda stop in the vicinity of the white Isuzu Trooper and observed Mr. Gray get out of the I – get out of the Mazda, walk up to the Trooper, attempt to open the door, which was locked, and then return to the Mazda. Shortly thereafter, after some conversation between Gray and the people in the Mazda, being Mr. Cleveland and Vasquez, Gray returned towards the Trooper. At this time he was observed waving towards Juan Rodriguez, who was now coming down St. [16] Stephens Street the other way. The evidence would show that Mr. Gray and Rodriguez ultimately met at the Trooper, exchanged greetings, and got into that vehicle and then with Rodriguez driving pulled that vehicle up behind the Mazda. All of these activities were observed by surveillance agents.

The vehicles were stopped shortly after that as they attempted to leave the area, the Symphony hall area, on St. Stephens Street, and a search was conducted of the Isuzu Trooper. In the rear of the Isuzu Trooper agents discovered in a hidden compartment under the rear seat six separately bundled packages, which were later, upon chemical analysis, determined to contain 6,003.5 grams of

89 percent pure cocaine. After the search of the Trooper and the discovery of that cocaine, agents then searched the Mazda that Mr. Cleveland had been operating and determined it to be a rental vehicle rented in a name other than Mr. Cleveland's. Upon opening the trunk, they found a Louis Vuitton bag. Inside that bag agents observed a role of duct tape. They also observed a role or a length of rope, and they also observed three firearms. The firearms, your Honor, were all loaded in some fashion and were found to consist of the following weapons: One was a .357 Magnum Taurus revolver, serial number HL106626. That weapon had three .357 Magnum [17] caliber live cartridges in the revolver. Secondly, they observed a .45 caliber SIG-Sauer Model P-220 semiautomatic pistol with a black holster. That weapon contained – had in a magazine seven live cartridges. And finally, your Honor, the third weapon was a nine millimeter caliber Taurus model PT92AF, again a semiautomatic pistol with a serial number L89154. That had a magazine with 14 live rounds or cartridges. All three weapons, your Honor, were subsequently submitted to the Department of the Commonwealth of Massachusetts State Police ballistics laboratory where, upon specialized examination, they were all found to be operable firearms in and capable of discharging the cartridges.

After the discovery of the drugs and then the weapons, your Honor, all defendants were formally placed under arrest and taken to the DEA offices in Boston. Upon arrival there, and after being given rights, Mr. Cleveland indicated that he desired to speak to agents. In particular, he spoke to Agent Bruce Travers of DEA. Mr. Cleveland, after executing waivers of his right

to counsel, and his right to remain silent, first spoke to the agents and then wrote out a handwritten statement. The substance of Mr. Cleveland's statement, which would qualify as a confession, was that on October 17th he received a telephone call from Enrique Gray, Mr. Gray [18] indicating that he wanted to come to Boston and, quote, conduct some business the following day.

Mr. Cleveland stated that on October 18th he received a call from Mr. Gray. He met with Mr. Gray. Mr. Gray told him that he had ordered up six kilograms of cocaine from an individual who was described as a Juan and a Ramon, those individuals being Juan Rodriguez and Ramon Vasquez. Mr. Cleveland said that in discussing this proposed pickup of six kilograms of cocaine from Vasquez and Rodriguez, they discussed stealing or ripping off that quantity of cocaine. And for that purpose they assembled the three weapons, placed them in a Louis Vuitton bag, put the bag together with duct tape and rope in the car and after getting a message by beeper at approximately 4:00 p.m., they traveled to the Symphony Hall area of Boston for the purposes of meeting Vasquez and Rodriguez and making arrangements to receive the cocaine.

According to Mr. Cleveland, he and Gray agreed that they would not purchase cocaine, but in fact would steal the cocaine. The plan was to take Rodriguez and Gray – excuse me – Rodriguez, Vasquez, and anyone else, that being Willy Acosta, to a nearby hotel where they would tie them up, tape them, and then steal the cocaine.

Your Honor, the Government would also note that the tape and rope was found in the same container and in [19] close proximity to those three loaded weapons.

Your Honor, that, in essence, would be the evidence the Government would offer during the course of trial.

Thank you.

THE COURT: Thank you.

Mr. Cleveland, have you heard and understood the summary of the evidence that would be offered against you if the case were tried?

THE DEFENDANT: May I have a second?

THE COURT: Yes, you may.

(Pause.)

THE DEFENDANT: Your Honor, the question again? I'm sorry. Could you repeat your question again?

THE COURT: Yes. Have you heard and understood the summary of the evidence that would be offered against you if the case were tried?

THE DEFENDANT: Yes, I did, sir. I heard.

THE COURT: Do you agree that you did the things that were said to be your acts in the course of that summary?

THE DEFENDANT: I agree I did most of the things, but some of it, it's not true.

THE COURT: I'm sorry?

THE DEFENDANT: I said agree that I did most of [20] the things in that, but some of it is not true in any statement, sir.

THE COURT: Well, I need to be a little more – need you to be a little more precise than that, because before I make a determination that it's appropriate for me to accept your change of plea, I need to have from you an acknowledgment that you did enough of those things to constitute –

THE DEFENDANT: Yes, I acknowledge that.

THE COURT: – the admission of the elements of the crime. So, if you want to tell me in your own words what it is that you're not agreeing to, I'll let you do it that way. If you –

THE DEFENDANT: I agree that I did most of the things.

MR. CUNHA: There were a couple of things that – in its statement, Judge that he felt were not accurate, and perhaps it would just be better if he articulated those things on the record.

THE COURT: That's fine. You may do that.

THE DEFENDANT: First of all, on the record, Mr. Locke states that we got out of the car and spoke with Mr. Acosta. I never left the car. Enrique Gray, he never left the car and spoke with Mr. Acosta at all. He spoke real quick. It was not a long time at all.

[21] THE COURT: All right.

THE DEFENDANT: Secondly, the statement I made, the statement at the police station to the officer

there, DEA officer there, I did a lot of it out of fear and Mr. Enrique Gray never spoke to me about how much cocaine or whether it was cocaine or not. He said it was just business he wanted to go on between me and him. It wasn't a determined amount.

THE COURT: All right. Now, earlier this morning on your behalf your counsel filed a reservation of rights under a conditional plea. You understand the document I'm talking about?

THE DEFENDANT: Yes, I do, sir.

THE COURT: Have you gone over that document with your counsel?

THE DEFENDANT: Yes, I have, sir.

THE COURT: All right. Now, subject to that reservation, which I accept, and without objection by the Government, have you voluntarily reached a decision that you want to plead guilty to the charges against you in counts three and four?

THE DEFENDANT: Yes, I have, sir.

THE COURT: Do you believe you are guilty of those charges?

THE DEFENDANT: Yes, sir.

* * *

THE CLERK: Donald E. Cleveland, on Criminal Number 94-10292-K, on counts three and four of a five count second superseding indictment you have previously pled not guilty. Do you now wish to change your plea?

THE DEFENDANT: Yes, I do.

[23] THE CLERK: What say you now as to count three; guilty or not guilty?

THE DEFENDANT: Guilty, ma'am.

THE CLERK: As to count four; guilty or not guilty?

THE DEFENDANT: Guilty, ma'am.

THE COURT: All right. The pleas will be entered. You may be seated.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	:	Criminal
V.	:	No. 94-10292-REK
ENRIQUE A. GRAY	:	

Courtroom No. 11 Federal Building Boston, MA 02109 2:20 p.m., Friday July 21, 1995

Before: THE HONORABLE ROBERT E. KEETON
UNITED STATES DISTRICT COURT JUDGE

Change of Plea

Marie L. Cloonan
Federal Court Reporter
1690 U.S.P.O. & Courthouse
Boston, MA 02109 – 426-7086
Mechanical Steno – Transcript by Computer

APPEARANCES:

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on behalf of the Government.

ZALKIND, RODRIGUEZ, LUNT & DUNCAN,
(by Norman S. Zalkind, Esquire),
65A Atlantic Avenue, Boston, MA 02110,
on behalf of the Defendant.

* * *

[6] THE COURT: Did you also go over Counts 3 and 5 of this second superseding indictment with your attorney?

THE DEFENDANT: Yes, we did.

THE COURT: Do you feel that you fully understand the charges that are made against you in these two counts?

THE DEFENDANT: Yes, I do.

THE COURT: Now, you understand that Count 3 is a charge under 21 United States Code, Section 846 charging an attempt to possess cocaine with intent to distribute, charging that on or about October 18th, 1994, in Boston, in the District of Massachusetts, and elsewhere, you and Donald Cleveland did knowingly and intentionally attempt to possess [7] with intent to distribute a quantity of cocaine, a Schedule II controlled substance, in violation of 21 United States Code, Section 841(a)(1), all in violation of 21 United States Code, Section 846 and 18 United States Code, Section 2, that latter statute being the aiding and abetting statute. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, also, following that count in the indictment is a notice of applicability of 21 United States Code, Section 841(b)(1)(A)(2), saying that the crimes described in other counts and in Count 3 of this indictment involved five or more kilograms of cocaine and, accordingly, the notice states 21 United States Code,

Section 841(b)(1)(A)(2) applies to Count 3. You understand that notice?

MR. ZALKIND: He understand [sic] the notice, your Honor. He's not agreeing that it's that amount.

THE COURT: Yes. I'm not asking about that at this time.

You understand –

THE DEFENDANT: Yes.

THE COURT: – the notice that –

THE DEFENDANT: Yeah, I just noticed that just when he said, too.

THE COURT: All right.

[8] All right. Now, Count 4 – Count 5 is a charge under Title 18 United States Code, Section 924(c)(1) concerning carrying and using a firearm during and in relation to a drug trafficking crime. And it charges that on or about October 18th, 1994, in Boston, in the District of Massachusetts, you did knowingly and intentionally use and carry a firearm, to wit: a Sig Sauer Model P220 .45-caliber pistol, bearing Serial No. G203454; a Taurus .357-caliber Magnum revolver, bearing Serial No. HL106626; and a Taurus Model PT92AF nine-millimeter pistol, bearing Serial No. L89154, during and in relation to the drug trafficking crime alleged in Count 3 of this indictment, to wit: attempt to possess cocaine with intent to distribute, in violation of 21 United States Code, Section 846, all in violation of 18 United States Code, Section 924(c)(1) and 18 United States Code, Section 2.

Do you feel you fully understand that charge against you?

THE DEFENDANT: Yes, I do.

* * *

[21] THE COURT: All right.

Now, I am going to ask Mr. Locke to summarize the evidence that would be offered against you if the case were tried, and I will want to ask you to listen carefully to [22] that summary because I will then want to ask you if you agree that you did the things that are said in that summary letter to be your act. You may be seated while this summary is given.

Mr. Locke.

MR. LOCKE: Your Honor, may it please the Court, were this matter to proceed to trial, the government would offer evidence relating to events occurring primarily on October 18 of 1994 in Connecticut and in Massachusetts and in New York as well.

Your Honor, the government would show first that in the fall of 1994, the Drug Enforcement Administration in Connecticut was conducting a drug investigation focusing on the activities of a suspected cocaine trafficker named Juan Pagon and had focused on an apartment complex that Pagon was related to and that that was located in Rocky Hill, Connecticut.

And the government would show that on or about – on October 18, 1994, the Drug Enforcement Administration had established a surveillance on that apartment

complex and that surveillance included the use of video surveillance.

That on October 18th, both agents observed and recorded through video surveillance the arrival of two other individuals, a Ramon Vasquez and Juan Rodriquez, and that those two men arrived in separate vehicles. Mr. Vasquez was [23] accompanying a male named William Acosta and a woman associated with Mr. Acosta, and that they were followed into that complex by Juan Rodriquez who was driving a separate vehicle.

The agents observed Mr. Acosta and his female associate go inside Pagon's or apartment building in what was later determined Pagon's apartment. And that Rodriquez and Vasquez waited outside some period of time until they were joined by Acosta. And at his direction both Vasquez and Rodriquez got into a second vehicle and left the Rocky Hill complex with an individual who at that time was unknown, was later determined to be an associate of Mr. Pagon.

Approximately an hour and 15 to an hour and 20 minutes later, Pagon's associate and Vasquez returned to the apartment complex in a vehicle followed by Juan Rodriquez, who at this time was driving a white Isuzu Trooper. That vehicle was known to DEA Agents in Connecticut through information that they had received that that was a vehicle owned and controlled by Mr. Pagon and used to convey drugs and/or drug proceeds in a concealed compartment located in the passenger area of that vehicle.

Shortly after Vasquez and Rodriquez returned to the complex, Acosta came out, and Mr. Acosta, his female

associate and Mr. Vasquez then left in Acosta's automobile, [24] left the apartment complex, followed by Rodriquez in the Isuzu Trooper.

They traveled, your Honor, under surveillance by DEA, from Rocky Hill, Connecticut, up Route 91, and then into Massachusetts, and onto Route 90, that being the Mass. Pike, in Springfield, Massachusetts. And ultimately, the two vehicles were followed to the Symphony Hall area of Boston.

The government would show that DEA Agents both from Connecticut and in Boston established a surveillance in the Symphony Hall area and observed Rodriquez and Acosta both travel onto St. Stephens Street in Boston.

They observed Rodriquez then meet with Vasquez in the area of Symphony Hall and proceed to establish what appeared to be a lookout, either looking for other individuals or looking for possible law enforcement surveillance.

The government would show that Mr. Acosta drove around the area and was observed to meet with this defendant, Enrique Gray. Enrique Gray was together with another co-defendant, Donald Cleveland, and they were in a white Mazda sedan, a Mazda 929 automobile, that was later determined to have been rented by an unknown individual from a Budget Rent-A-Car service.

The government would show, your Honor, that after [25] Acosta spoke with Gray and Cleveland, that Gray and Cleveland, in the Mazda, proceeded to follow Mr. Acosta around the area, around the block of Symphony Hall, ultimately traveling themselves onto St. Stephens Street.

At that time DEA Agents observed Ramon Vasquez in the rear seat of the Mazda. Mr. Gray was in the front passenger seat. Mr. Cleveland was driving.

That vehicle stopped on St. Stephens Street, and shortly after stopping, agents observed Gray get out of the Mazda and proceed to walk back up the street and walk to the white Isuzu Trooper that Rodriquez had earlier parked on the street. Gray attempted to open the passenger door, was unsuccessful. Apparently it was locked. He then walked back to the Mazda and got inside briefly. Then got out again and walked back towards the Trooper.

At this time, seeing Mr. Rodriquez who was approaching from the other direction, and after acknowledging one another with some sort of hand signals or waves, the two men met at the Isuzu Trooper.

At that time Rodriquez got in the driver's side. Mr. Gray was able then to get into the passenger side of that vehicle. And after several minutes that Isuzu Trooper pulled up behind the Mazda, both vehicles apparently preparing to leave the area.

At that time DEA Agents stopped the two vehicles, [26] removed the occupants, subsequently searched the Trooper and found in a concealed compartment in the rear passenger area some six kilogram packages of what appeared to be cocaine and what was later submitted for full analysis. And the six packages contained a total net weight of six thousand and three point five grams of 89 percent pure cocaine.

After finding that cocaine, agents placed all the individuals formally under arrest and conducted a search of the Mazda 929 sedan, in the trunk of which they found a Louis Vitton bag. And in that bag found three loaded firearms.

They found first, your Honor, a nine-millimeter caliber Taurus Model P292AF semiautomatic pistol with a Searial [sic] Number L89154. That weapon had a magazine with 14 live cartridges in it.

They found as well a .45-caliber automatic Sig Sauer Model P220 semiautomatic pistol, Serial No. G203454. That weapon was also loaded with seven live rounds inside a cartridge.

Thirdly, they found a .357 Magnum caliber Taurus revolver, Serial No. HL106626. That had three live caliber – live cartridges in the cylinder of that revolver.

They also found at that time, your Honor, some duct tape and a rope in the trunk of that Mazda automobile.

Thereafter, Mr. Gray was questioned by law [27] enforcement agents. As the Court well knows there was prior hearings. That questioning occurred at approximately 11:00 p.m. on October 18. And at that time Mr. Gray told the agents that he was familiar with Mr. Vasquez and Mr. Rodriquez. That he had negotiated with Juan Rodriquez for the delivery of five to eight kilograms of cocaine in Boston. That Mr. Rodriquez told him that he would have it available on October 18, that he would have to go to Connecticut to get it and that he would

meet this defendant, Gray, in Boston and would communicate with him by means of beeper devices when he was on his way with that cocaine.

Mr. Gray further said that he only intended to receive one kilogram of cocaine and also stated that he, upon arrival in Boston, contacted Donald Cleveland and communicated the possibility of doing – quote, doing some business in Boston with Mr. Cleveland.

That business, by agreement between Gray and Cleveland, involved a plan to steal cocaine from Mr. Rodriquez and Mr. Vasquez and any other partner that they might have in Boston.

Pursuant to that plan to steal it, weapons were obtained. Mr. Gray indicated that he had met a man earlier that afternoon who had a nine-millimeter Taurus semiautomatic handgun that Mr. Gray intended to purchase with monies obtained as a result of receiving the cocaine or [28] stealing the cocaine from Vasquez and Rodriquez.

Mr. Gray further acknowledged that at about four o'clock that afternoon he received a message on his pager from Rodriquez and pursuant to that message communicated with Rodriquez and went to the Symphony Hall area of Boston, driven by Cleveland, for the purpose of rendezvousing with Rodriquez and Vasquez and arranging the transfer of cocaine.

According to Mr. Gray – or strike that.

Your Honor, Mr. Gray then indicated that he did, in fact, go to that location and did meet up with Rodriquez and Vasquez.

The government would also offer evidence, your Honor, that among the possessions of Mr. Gray and Mr. Vasquez, Rodriquez and Cleveland were various telephone numbers that permitted the communication by and between various defendants. In particular, Mr. Gray had telephone numbers for Mr. Vasquez, as well as Mr. Cleveland, as well as for a restaurant in New York that Mr. Rodriquez associated with, that being called Vanilia Restaurant in upper Manhattan, New York.

The government would also show, your Honor, that all defendants possessed and carried during the course of their event – their activities on October 18 various beepers and cellular telephones that permitted communication by and between all the parties.

[29] That, in essence, your Honor, would be the evidence the government would offer at trial.

THE COURT: Mr. Gray, have you heard and understood the summary of the evidence that Mr. Locke has stated?

THE DEFENDANT: Yes.

THE COURT: Do you agree that you did the things that were said to be your acts in that summary?

THE DEFENDANT: Yes.

THE COURT: All right.

Now, before I accept your plea, I want to be satisfied that you believe you are guilty subject to the reservation with respect to the matters on which you've reserved the right to appeal and that you,re doing this voluntarily.

Do you believe you are guilty of these two offenses?

THE DEFENDANT: Yes.

* * *

[30] THE CLERK: Enrique Gray, on Criminal No. 94-10292-K, on Counts 3 and 5 of a five-count second superseding indictment, you previously pled not guilty. Do you now wish to change your plea?

THE DEFENDANT: Yes.

[31] THE CLERK: What say you now as to Count 3, guilty or not guilty?

THE DEFENDANT: Guilty.

THE CLERK: As to Count 5, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: All right.

The pleas of guilty will be entered. You may be seated.

* * *

UNITED STATES DISTRICT COURT
District of Massachusetts

UNITED STATES OF AMERICA

v.

Donald Cleveland

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
1:94CR10292-004

John H. Cunha, Jr., Esq.
11/1/95
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) SS3 and SS4
[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	Possession of cocaine with intent to distribute	10/18/1994	SS3
18 U.S.C. § 924(c)(1)	Carrying and using a firearm during and in relation to a drug trafficking crime	10/18/1994	SS4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[X] Count(s) SS1 is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 024-50-7323	10/17/1995 Date of Imposition of Judgment
Defendant's Date of Birth: 08/10/1964	/s/ Robert E. Keeton Signature of Judicial Officer
Defendant's USM No.: 20338-038	Robert E. Keeton United States District Judge Name & Title of Judicial Officer
Defendant's Residence Address: One Howland Street Dorchester, MA 02121	November 1, 1995 Date
Defendant's Mailing Address: One Howland Street Dorchester, MA 02121	

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 180 month(s).

120 months on Count 3 of the second superseding indictment, and 60 months on Count 4 of the second superseding indictment, consecutive to the term in custody under Count 3.

Credit for time in custody since date of arrest, October 18, 1994.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

  [ ] at ___ a.m./p.m. on ___.
  [ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

  [ ] before 2 p.m. on _____.
  [ ] as notified by the United States Marshal.
  [ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on 12-20-95 to FCL-RBK at _____, with a certified copy of this judgment.

/s/ W.S. Keller Warden
UNITED STATES MARSHAL

By /s/ Illegible
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 60 month(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[ ] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 100.00	$	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement .... $ _____

Special assessment of $50.00 on each of second superseding counts 3 and 4 for a total of $100.00.

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  [ ] The interest requirement is waived.
  [ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order Percentage of Payment
Totals:	$_____	$_____	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $_____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [ ] in installments to commence ___ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of ___ year(s) to commence ___ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the costs of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the

Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 29+

Criminal History Category: III

Imprisonment Range: 120 to 135 months

Supervised Release Range: 5 to 5 years

Fine Range: $ 15,000.00 to $ 4,500,000.00

[X] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

_____

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO.
V.	)	94-10292-004-REK
	)	
DONALD CLEVELAND	)	
	)	
	)	

NOTICE OF APPEAL
November 1, 1995

KEETON, D.J.

Now comes the defendant, DONALD CLEVELAND, and hereby appeals from the Judgment and Commitment Order this date.

By the Court:

By: /s/ Joanne M. Cull
Joanne M. Cull
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES	)	
	)	CRIMINAL NO.
V.	)	94-10292-REK
	)	
JUAN RODRIGUEZ, RAMON VASQUEZ, ENRIQUE GRAY and DONALD CLEVELAND	)	
	)	
	)	
	)	

MOTION FOR CORRECTION OF SENTENCE
OR OTHER APPROPRIATE RELIEF

Defendant Enrique Gray respectfully moves for correction of sentence pursuant to Fed. R. Crim. P. 35(c), or other appropriate relief. As grounds therefor, defendant states:

1. The defendant pled guilty to a charge of carrying and using a firearm during and in relation to a drug trafficking crime, 18 U.S.C. §924(c)(1).

2. This plea was grounded in evidence that a gun was found in the trunk of a car that the defendant admited he had been in.

3. The Supreme Court, in *Bailey v. United States*, 1995 WL 712269, *5 (12/6/95), Justice O'Connor, for a unanimous court, held that liability attaches under 18 U.S.C. §924(c)(1) only for actual use, not simply intended use. No such actual use was alleged or proven in the case of Enrique Gray.

4. Because the facts articulated and admitted to cannot sustain a conviction under 18 U.S.C. §924(c)(1), the defendant moves that his sentence be vacated, as it is now shown to be in clear error of law.

The defendant requests that he be permitted to further brief this issue, and be allowed one week to prepare said brief.

Respectfully submitted,

ENRIQUE GRAY

/s/ Norman Zalkind
Norman S. Zalkind
BBO # 538880
ZALKIND, RODRIGUEZ,
LUNT & DUNCAN
65a Atlantic Avenue
Boston, MA 02110
742-6020

December 8, 1995

I certify that I have this day caused to be served by United States Mail, postage prepaid, a copy of this document on all counsel of record.

/s/ Illegible

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CR NO.
V.	)	94-10292-REK
	)	
DONALD CLEVELAND	)	
	)	

MOTION FOR CORRECTION OF SENTENCE
OR OTHER APPROPRIATE RELIEF

Defendant Donald Cleveland respectfully moves for correction of sentence pursuant to Fed. R. Crim. P. 35(c) and 28 U.S.C. § 2255, or other appropriate relief. As grounds therefore, defendant states:

1. The defendant pled guilty to a charge of carrying and using a firearm during and in relation to a drug trafficking crime, 18 U.S.C. § 924(c)(1).

2. This plea was grounded in evidence that a gun was found in the trunk of a car that the defendant admitted he had been in.

3. The Supreme Court, in *Bailey v. United States*, 1995 WL 712269, *5 (12/6/95), Justice O'Connor, for a unanimous court, held that liability attaches under 18 U.S.C. § 924(c)(1) only for actual use, not simply intended use. No such actual use was alleged or proven in the case of Donald Cleveland.

4. Because the facts articulated and admitted to cannot sustain a conviction under 18 U.S.C. § 924(c)(1), the defendant moves that his sentence be vacated, as it is now shown to be in clear error of law.

The defendant's Memorandum of Law accompanies this motion.

DONALD CLEVELAND
By his attorney,

John H. Cunha Jr.
B.B.O. No. 108580
SALSBERG & CUNHA
20 Winthrop Square
Boston, MA 02110-1274
(617) 338-1590

Date: January 11, 1996

CERTIFICATE OF SERVICE

I certify that on this day I served a copy of this motion by first class mail, postage pre-paid, to counsel of record for all parties.

John H. Cunha Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA V. JUAN RODRIGUEZ, RAMON VASQUEZ, ENRIQUE GRAY and DONALD CLEVELAND, Defendants	CRIMINAL CASE No. 94-10292-REK

Memorandum and Order
April 25, 1996

Before this court is defendant Enrique Gray's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 175, filed December 8, 1995). Defendant Gray makes this motion under Federal Rule of Criminal Procedure 35(c) and, in the alternative, under 28 U.S.C. §2255, and he also seeks to withdraw his plea.

Because a final judgment in this case has not yet been entered as a defendant Gray, the court treats the pending motion as a motion to reconsider sentencing, and, in the alternative, to withdraw his plea. In any event, whatever the most appropriate procedural label may be, I conclude that it is appropriate to decide defendant Gray's challenge to the sentence on the merits.

I. Background

The relevant facts giving rise to Defendant Gray's arrest and guilty plea are summarized here. These facts are based on the summary of evidence presented by the

government during defendant Gray's Change of Plea Hearing. At that hearing, defendant Gray agreed that he did the acts attributed to him in the summary of evidence.

Before October 18, 1994 defendant Gray arranged with defendant Rodriguez to purchase between five and eight kilograms of cocaine. Defendant Rodriguez made arrangements to get the cocaine and transport it to Boston. Defendant Gray called his friend, defendant Cleveland, in Boston to alert him to an opportunity to make some money. After arrival in Boston, defendant Gray made plans with defendant Cleveland to meet defendant Rodriguez and associates of Rodriguez and to steal some of the cocaine rather than purchase it. Defendants Gray and Cleveland, "pursuant to the plan to steal it [the cocaine]," obtained weapons.

Meanwhile, agents of the Drug Enforcement Administration ("DEA agents") in Connecticut had a known drug trafficker under surveillance at an apartment complex in Rocky Hill, Connecticut. Four individuals, including defendants Rodriguez and Vasquez, were observed leaving the apartment complex. Defendant Rodriguez was driving a white Isuzu, and defendant Vasquez and the other two individuals were in a Lexus. DEA agents followed the vehicles from Connecticut into Boston to the vicinity of Symphony Hall. The driver of the Lexus was observed talking with defendant Gray who was sitting in a white Mazda driven by defendant Cleveland. All three vehicles were eventually observed parked close together on St. Stephens Street. At this point, defendant Vasquez was seen sitting in the back seat of the Mazda. The Lexus departed and defendant Gray was then observed getting

into the Isuzu with defendant Rodriguez. Both vehicles then attempted to leave the area. The DEA agents stopped and detained all of the defendants and searched both vehicles. The agents confiscated six kilograms of cocaine found in a hidden compartment of the Isuzu and three handguns found in the trunk of the Mazda.

On July 21, 1995 Defendant Gray pled guilty to counts three and five of the second superseding indictment. Under count three, defendant Gray was charged with attempting to possess cocaine with intent to distribute in violation of 21 U.S.C. §846, and under count five, defendant Gray was charged with carrying and using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. §924(c)(1).

On November 29, 1995 defendant Gray was sentenced to 120 months in prison for the offense charged in count three, and, concurrently, 60 months for the offense charged in count five, to be followed by 60 months supervised release.

On December 6, 1995 the Supreme Court issued an opinion in *Bailey* v. *United States*, 116 S.Ct. 501 (1995), in which the Court narrowed the interpretation of "use" under §924(c)(1).

Defendant Gray now challenges the sentence imposed on him at the November 29, 1995 hearing and contends that the factual basis for his guilty plea to count five no longer constitutes a crime under the new interpretation of §924(c)(1) announced in *Bailey*.

A. Interpretation of §924(c)(1) under *Bailey* v. *United States*

Before the decision announced in *Bailey* v. *United States*, convictions for "use" under §924(c)(1) were upheld in this circuit where a firearm was simply present for the protection of drugs for sale. *See, United States* v. *McFadden*, 13 F.3d 463 (1st Cir. 1994) (presence of an unloaded gun between mattress and boxspring in defendant's apartment is sufficient evidence for "use" of a firearm in violation of §924(c)(1) under "fortress" theory). In *Bailey*, a unanimous Court rejected application of the statute on the basis of a "fortress" theory and held that in order to support a finding of "use" under §924(c)(1), the evidence must be "sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey*, 116 S.Ct. at 505. The Court stated that active employment includes, "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508.

Defendant Gray asserts that under this new interpretation his guilty plea to count five is not supported by sufficient facts and therefore his sentence for the violation in count five should be vacated. The government contends that there is no basis on which to vacate defendant Gray's sentence because he was also indicted for and pled guilty to "carrying" a firearm in violation of §924(c)(1) and a sufficient factual basis exists to support his guilty plea.

Under the definition of "use" announced in *Bailey*, there is no evidence in this case that defendant Gray ever

"used" a firearm in relation to drug trafficking. But, in *Bailey* the Court explicitly did not address whether there was evidence sufficient to convict the defendant of "carrying" a firearm in violation of §924(c)(1). Bailey's conviction was based on evidence of a loaded pistol that was found in a bag in the trunk of his car. *Id.* at 504. The Court remanded the case for the Court of Appeals for the District of Columbia Circuit to consider whether there was a basis for upholding the conviction under the "carry" prong of the statute. *Id.* at 509.

Although the Court in *Bailey* interpreted only the "use" prong of §924(c)(1), its approach to analyzing the statute, as well as First Circuit cases before *Bailey*, are instructive.

B. Carrying a Firearm in violation of §924(c)(1)

Section 924(c)(1) states in relevant part:

> Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such . . . drug trafficking crime, be sentenced to imprisonment for five years.

In order to support a finding of violation of §924(c)(1) the evidence must show that 1) a defendant either used or carried a firearm and 2) that it was in relation to drug trafficking activity. *See, United States* v. *Wight*, 968 F.2d 1393, 1396 (1st Cir. 1992). Because the evidence on which defendant Gray pled guilty is not enough to support a conviction for the "use" prong of §924(c)(1), as it was interpreted in *Bailey*, defendant Gray's plea to count five of the second superseding indictment can stand only if

the evidence on which he pled guilty is sufficient to show that he "carried" a firearm "in relation to" drug trafficking activity.

The Court in *Bailey* states that Congress would have used the word "possess" if it had meant for possession of a firearm to constitute a violation of §924(c)(1). *Id.* at 506. For that reason, "carry" must mean more than mere possession of a firearm. *See also, United States* v. *Plummer,* 964 F.2d 1251 (1st Cir. 1992) (mere possession of a gun during the course of criminal conduct will not support a conviction). In addition, if a word is not explicitly defined by statute, it should be given its ordinary meaning. *See, United States* v. *Manning,* ___ F.3d ___ (1st Cir. 1996), 1996 WL 116990 (3/21/96), *citing, Smith* v. *United States,* 113 S.Ct. 2050, 2054 (1993) (noting that words not defined by statute should be given their ordinary or common meaning). The Random House Dictionary of the English Language, Second Edition (1987), defines "carry" as follows: "to take or support from one place to another; convey; transport."

Defendant Gray contends that, after the decision announced in *Bailey,* "carry" must be interpreted to mean "on or about the defendant's person." Some circuits have required a showing that a firearm has been on or about the defendant's person in order to support liability under the "carry" prong of §924(c)(1). *See e.g., United States* v. *Hernandez,* ___ F.3d ___ (9th Cir. 1996), 1996 WL 34822 (1/31/96) (gun found inside a locked toolbox during the drug trafficking crime was not "carried" under §924(c)(1)); *and, United States* v. *White,* ___ F.3d ___, (8th Cir. 1996), 1996 WL 154228 (3/21/96) (court upheld defendant's conviction for "carrying" a firearm where

gun was found under coat discarded by the defendant during flight from police). But, other circuits have required only that a firearm be accessible. *See e.g., United States* v. *Feliz-Cordero,* 859 F.2d 250, 253 (2nd Cir. 1988) (a firearm is carried if it was "within reach during the commission of the drug offense"). Since the decision in *Bailey* was announced, no circuit has decided whether evidence of guns found in a bag in a locked trunk, along with evidence that the guns were acquired and transported for use in relation to the drug trafficking crime, is sufficient to support a conviction for "carrying" a firearm in violation of §924(c)(1). *See e.g., United States* v. *Baker,* 78 F.3d 1241, 1247 (7th Cir. 1996) (court explicitly stated that its decision did not state an opinion "on whether a defendant who has drugs and a fully operable and loaded gun locked in the trunk of his car could be convicted under §924(c)(1) for carrying a firearm"). In fact, consideration of the same issue was left to the Court of Appeals for the District of Columbia Circuit when the Supreme Court remanded *Bailey.*

I conclude that I cannot sustain defendant Gray's contention that "[i]n this Circuit, a §924(c)(1) conviction for carrying has required that the weapon be immediately accessible." Defendant Gray's Memorandum in Support of Motion for Correction of Sentence (Docket No. 177), p.5. In both cases cited by defendant Gray for this proposition, the court was addressing the "in relation to" requirement of the statute and did not make a decision about the requirement for which defendant Gray cites them. *See, United States* v. *Plummer,* 964 F.2d 1251, 1253-1254 (1st Cir. 1992) ("Defendant conceded that the

presence of the gun in his vehicle was sufficient to establish . . . that he 'carried a firearm' [citations omitted]. Defendant argues, however, that the evidence was insufficient to establish . . . that he carried the gun 'in relation to' . . . "); *and, United States* v. *Payero,* 888 F.2d 928, 929 (1st Cir. 1989) (where "[t]he only issue on appeal was whether the trial court correctly and adequately instructed the jury with respect to the 'during and in relation to' element [of] the statute").

In the First Circuit, two cases decided since *Bailey* have addressed the scope of "carry". In *United States* v. *Manning,* ___ F.3d ___ (1st Cir. 1996), 1196 WL 116990, 2 (3/21/96), the court did not define the "precise contours" of "carry", but held that "Manning's actions me[ ]t any reasonable contours of the 'carry' prong." In *Manning,* the defendant was observed carrying a briefcase into a garage. Shortly thereafter, a police officer found the briefcase that contained cocaine, a handgun and six pipebombs. In *United States* v. *Ramirez-Ferrer,* ___ F.3d ___ (1st Cir. 1996), 1996 WL 125595, 4 (3/27/96), the court, sitting en banc, vacated the defendants' convictions under the "use" prong, but required reconsideration by the panel on the "carry" prong "since *Bailey* has both limited the word 'use' to the extent that it cannot apply in the instant case and emphasized that 'carry' has meanings not covered by 'use'." In *Ramirez-Ferrer* a loaded handgun was found covered by a t-shirt in a storage compartment near the location where one of the defendants had been sitting when the defendants' boat, in which they were transporting cocaine, was interdicted off the coast of Puerto Rico. *Id.* at 2. Both cases recognize that

the ordinary meaning of "carry" includes transporting a firearm without actually holding it.

Before *Bailey,* courts in this circuit did not clearly distinguish between "use" and "carry" under §924(c)(1). But, convictions for violations under §924(c)(1) were upheld where a firearm was found in a vehicle, but was not necessarily accessible to the defendant. In those cases the focus was on the "facilitative nexus" between the possession of the firearm and its role in the criminal activity. *See, United States* v. *Castro-Lara,* 970 F.2d 976, 983 (1st Cir. 1992); *and, United States* v. *Reves-Mercado,* 22 F.3d 363 (1st Cir. 1994).

In *Castro-Lara,* the case most closely analogous to the one before this court, an unloaded firearm and live ammunition were found in a briefcase in the locked trunk of the defendant's car. Authorities apprehended the defendants when they were about to drive off carrying cocaine that they picked up at an airstrip. The court in *Castro-Lara* focused on the location of the firearm ("at the place where drugs were to be delivered") and the defendant's timing (the defendant "brought the gun to the airstrip in the course of taking delivery of . . . cocaine") in affirming the defendant's conviction. *Castro-Lara,* 970 F.2d at 983. The court held that the evidence was sufficient to show that the gun was "available for use in connection with the narcotics trade," rejected any requirement that the gun be on the defendant's person, and did not hold "instant availability" to be the critical concern. *Id.* The court in *Castro-Lara* also noted First Circuit cases in which a firearm found in a defendant's vehicle, but not on his person, was sufficient to support a conviction under

§924(c)(1). *Id.* The focus in those cases has been to distinguish from "mere possession," but not require that a defendant have actively employed a firearm. Although the interpretation of §924(c)(1) in *Bailey* creates a requirement for "active employment" when there is an indictment for "use", the Court made it clear that "carry" must be given a distinct and separate meaning. *Bailey*, 116 S.Ct. at 507.

The analysis in *Castro-Lara* is in accord with the Court's emphasis in *Bailey* on congressional intent that "require[s] more than possession to trigger the statute's application." *Id.* In *Bailey*, the Court decided what "more" means when there is an indictment for "use", but not when there is an indictment for "carry". The evidence is this case indicates that defendants Gray and Cleveland did more than merely possess the three guns. During the afternoon of October 18, 1994 defendants Cleveland and Gray planned to steal the cocaine, obtained guns that were placed in a bag in the trunk of the Mazda, and then transported the guns to the meeting with defendants Rodriguez and Vasquez. As in *Castro-Lara*, both the location of the guns (in the car they were using in their drug trafficking scheme) and defendant Gray's and defendant Cleveland's timing (obtaining the guns in order to steal the cocaine) indicates that defendants Gray and Cleveland controlled the guns and that the guns facilitated their attempt to possess cocaine. By their own admissions the guns had a central role in their scheme to possess some, if not all, of the cocaine being transported in the Isuzu.

The First Circuit cases cited above contrast with defendant Gray's contention that there is a requirement

in this circuit that a firearm be on or about the defendant's person in order to support a finding of violation of §924(c)(1). This circuit has consistently recognized the various ways that firearms may be carried in relation to a drug trafficking crime – whether by hand, in a briefcase, or somewhere in a vehicle. Recognizing that often vehicles are used to carry both drugs and firearms, the Fifth Circuit has further defined "carry" in both the vehicle and non-vehicle contexts. *See, United States* v. *Pineda-Ortuno*, 952 F.2d 98 (5th Cir. 1992). In *Pineda-Ortuno*, the court held that the literal meaning of "carry" includes carriage by a vehicle, but easy access to a firearm is not a requirement as long as the defendant knowingly carried the firearm in the vehicle and did so in relation to a drug trafficking crime. *Id.* at 104. Defendants Gray and Cleveland admitted to obtaining guns and, in the ordinary sense of the word, carried the guns in the Mazda.

C. "In relation to"

The Supreme Court has held that the "in relation to" language in §924(c)(1) "clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith* v. *United States*, 113 S.Ct. 2050, 2059 (1993). It was no accident that there were three guns in the trunk of the Mazda. Defendants Gray and Cleveland obtained the guns for the purpose of stealing the cocaine from defendant Rodriguez and his associates. Therefore, the "in relation to" prong of the statute is met.

D. Aiding and Abetting

Defendant Gray also contends that because he was not a passenger of the vehicle in which the guns were found, he could not have been carrying them. At his sentencing hearing, defendant Gray was read the second superseding indictment that includes the charge of aiding and abetting in both counts three and five. Defendant Gray indicated at the hearing that he understood those charges. Transcript of Change of Plea Hearing, p. 8. He cannot prevail on a contention that he did not understand the charges. In any event, the evidence presented by the government showed that defendant Gray "associated himself with the venture, participated in it as in something he wished to bring about, and sought by his actions to make it succeed." *United States* v. *Alvarez*, 987 F.2d 77, 83 (1st Cir. 1993). Defendant Gray cannot now prevail on a contention that his plea is not supported by the evidence simply because he was not in the car when the DEA agents detained all of the defendants.

III. Conclusion

The evidence in the case now before this court is a prime example of using a vehicle to carry firearms in relation to a drug trafficking crime. Although *Bailey* restricts the definition of "use" under §924(c)(1) and the evidence does not support defendant Gray's guilty plea for "using" a firearm, the evidence does support his guilty plea for "carrying" a firearm. Defendant Gray initiated this venture by arranging to purchase cocaine from defendant Rodriguez. Defendants Gray and Cleveland pursued their plan to steal the cocaine by obtaining guns

and carrying them in the Mazda to their meeting with defendant Rodriguez. That their plan made holding the guns in their hands impractical and that vehicles are commonly used for carrying both guns and drugs only strengthen what is already sufficient evidence to support defendant Gray's guilty plea to count five of the second superseding indictment.

ORDER

For the reasons stated in the foregoing memorandum, it is ORDERED:

(1) Defendant Gray's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 175) is DENIED.

(2) Further hearing as to the form of the sentence and entry of judgment is set for 2:00p.m. on May 21, 1996.

/s/ Robert Illegible
United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. JUAN RODRIGUEZ, RAMON VASQUEZ, ENRIQUE GRAY and DONALD CLEVELAND, Defendants	CRIMINAL CASE NO. 94-10292-REK

Memorandum and Order
April 25, 1996

Before this court is defendant Donald Cleveland's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 181, filed January 11, 1996). Defendant Cleveland makes this motion under Federal Rule of Criminal Procedure 35(c) and, in the alternative, under 28 U.S.C. § 2255.

Defendant Cleveland has already filed an appeal, as allowed under his conditional plea. This court nevertheless considers the motion now in order to inform the Clerk of the Court of Appeals of the order that this court would enter if directed by the Court of Appeals to hear and decide the motion despite the pendency of the appeal. *See, Commonwealth of Puerto Rico* v. *SS Zoe Colocotroni*, 601 F.2d 39, 42 (1st Cir. 1979) (when an appeal has been filed, district court should hear the motion and report what its order would be if authorized by the Court of Appeals to hear it.)

I. Background

The relevant facts giving rise to Defendant Cleveland's arrest and guilty plea are summarized here. These facts are based on the summary of evidence presented by the government during defendant Cleveland's Change of Plea Hearing. At that hearing, defendant Cleveland agreed that he did the acts attributed to him in the summary of evidence.

Before October 18, 1994 defendant Gray arranged with defendant Rodriguez to purchase between five and eight kilograms of cocaine. Defendant Rodriguez made arrangements to get the cocaine and transport it to Boston. Defendant Gray called his friend, defendant Cleveland, in Boston to alert him to an opportunity to make some money. After arrival in Boston, defendant Gray made plans with defendant Cleveland to meet defendant Rodriguez and associates of Rodriguez and to steal some of the cocaine rather than purchase it. Defendants Gray and Cleveland, "pursuant to the plan to steal it [the cocaine]," obtained weapons.

Meanwhile, agents of the Drug Enforcement Administration ("DEA agents") in Connecticut had a known drug trafficker under surveillance at an apartment complex in Rocky Hill, Connecticut. Four individuals, including defendants Rodriguez and Vasquez, were observed leaving that apartment complex. Defendant Rodriguez was driving a white Isuzu, and defendant Vasquez and the other two individuals were in a Lexus. DEA agents followed the vehicles from Connecticut into Boston to the vicinity of Symphony Hall. The driver of the Lexus was observed talking with defendant Gray who was sitting in

a white Mazda driven by defendant Cleveland. All three vehicles were eventually observed parked close together on St. Stephens Street. At this point defendant Vasquez was seen sitting in the back seat of the Mazda. The Lexus departed and defendant Gray was then observed getting into the Isuzu with defendant Rodriguez. Both vehicles then attempted to leave the area. The DEA agents stopped and detained all of the defendants and searched both vehicles. The agents confiscated six kilograms of cocaine found in a hidden compartment of the Isuzu and three handguns found in the trunk of the Mazda.

On July 17, 1995 Defendant Cleveland pled guilty to counts three and four of the second superseding indictment. Under count three, defendant Cleveland was charged with attempting to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846, and under count four, defendant Cleveland was charged with carrying and using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1).

On October 17, 1995 defendant Cleveland was sentenced to 120 months in prison for the offense charged in count three, and, concurrently, 60 months for the offense charged in count four, to be followed by 60 months supervised release. Defendant Cleveland's plea was conditioned upon allowance of his right to challenge on appeal the denial of his motion to suppress the evidence found in the Mazda (Docket No. 48, filed November 21, 1994; denied May 5, 1995). That appeal was filed on November 1, 1995, the day on which his final judgment was entered.

On December 6, 1995 the Supreme Court issued an opinion in *Bailey* v. *United States*, 116 S.Ct. 501 (1995), in which the Court narrowed the interpretation of "use" under § 924(c)(1).

Defendant Cleveland now challenges the sentence imposed on him at the October 17, 1995 hearing and contends that the factual basis for his guilty plea to count four did not constitute a crime under the new interpretation of § 924(c)(1) announced in *Bailey*.

II.

A. Procedural Posture of the Motion

Defendant Cleveland cannot now obtain relief under Federal Rule of Criminal Procedure 35(c) because a motion under that rule must be made within seven days after the imposition of sentence. Seven days had elapsed long before defendant filed the pending motion on January 11, 1996.

As explained below, however, defendant Cleveland may proceed under 28 U.S.C. § 2255. For this reason, his present motion will be considered by this court, under procedures consistent with *SS Zoe Colocotroni*.

It is the practice of the Clerk of this Court to treat a motion under § 2255 as a new civil proceeding. I conclude that defendant Cleveland's filing of the pending motion, and the Clerk's receiving and filing it, as part of his original criminal case do not create any impediment to this court's consideration of the motion on the merits.

B. Retroactive Application of Substantive Law

In *Sanabria* v. *United States*, 916 F.Supp. 106 (D.P.R. 1996), the new rule of substantive law announced in *Bailey* was applied retroactively to Sanabria's conviction for a violation of § 924(c)(1). Similarly, it is appropriate to apply the *Bailey* rule retroactively to defendant Cleveland's guilty plea. Such a retroactive application is consistent with the Supreme Court's approach in *Davis* v. *United States*, 417 U.S. 333 (1974), where, under a subsequent change in the substantive law, Davis could not be lawfully convicted and the Court found that "Davis' conviction and punishment [were] for an act that the law does not make criminal . . . [and t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under § 2255." *Id.* at 346-347; *See also, United States* v. *Fletcher*, ___ F.Supp. ___ (D. Kan. 1996), 1996 WL 109782, 3 (3/5/96) (noting cases in which courts have applied *Bailey* retroactively in response to § 2255 motions where sentences were imposed based on defendants' guilty pleas). Defendant Cleveland's motion is therefore appropriately before this court, for this court to consider whether defendant's guilty plea and sentence were for "an act that the law does not make criminal" because of the change announced in *Bailey*.

C. Interpretation of § 924(c)(1) under *Bailey* v. *United States*

Before the decision announced in *Bailey* v. *United States*, convictions for "use" under § 924(c)(1) were

upheld in this circuit where a firearm was simply present for the protection of drugs for sale. *See, United States* v. *McFadden*, 13 F.3d 463 (1st Cir. 1994) (presence of an unloaded gun between mattress and boxspring in defendant's apartment is sufficient evidence for "use" of a firearm in violation of § 924(c)(1) under "fortress" theory). In *Bailey*, a unanimous Court rejected application of the statute on the basis of a "fortress" theory and held that in order to support a finding of "use" under § 924(c)(1), the evidence must be "sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey*, 116 S.Ct. at 505. The Court stated that active employment includes, "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508.

Defendant Cleveland asserts that under this new interpretation his guilty plea to count four is not supported by sufficient facts and therefore his sentence for the violation in count four should be vacated. The government contends that there is no basis on which to vacate defendant Cleveland's sentence because he was also indicted for and pled guilty to "carrying" a firearm in violation of § 924(c)(1) and a sufficient factual basis exists to support his guilty plea.

Under the definition of "use" announced in *Bailey*, there is no evidence in this case that defendant Cleveland ever "used" a firearm in relation to drug trafficking. But, in *Bailey* the Court explicitly did not address whether there was evidence sufficient to convict the defendant of "carrying" a firearm in violation of § 924(c)(1). Bailey's conviction was based on evidence of a loaded pistol that

was found in a bag in the trunk of his car. *Id.* at 504. The Court remanded the case for the Court of Appeals for the District of Columbia Circuit to consider whether there was a basis for upholding the conviction under the "carry" prong of the statute. *Id.* at 509.

Although the Court in *Bailey* interpreted only the "use" prong of § 924(c) (1), its approach to analyzing the statute, as well as First Circuit cases before *Bailey,* are instructive.

D. Carrying a Firearm in Violation of § 924(c)(1)

Section 924(c)(1) states in relevant part:

> Whoever, during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such . . . drug trafficking crime, be sentenced to imprisonment for five years.

In order to support a finding of violation of § 924(c)(1) the evidence must show that 1) a defendant either used or carried a firearm and 2) that it was in relation to drug trafficking activity. *See, United States* v. *Wight,* 968 F.2d 1393, 1396 (1st Cir. 1992). Because the evidence on which defendant Cleveland pled guilty is not enough to support a conviction for the "use" prong of § 924(c)(1), as it was interpreted in *Bailey,* defendant Cleveland's plea to count four of the second superseding indictment can stand only if the evidence on which he pled guilty is sufficient to show that he "carried" a firearm "in relation to" drug trafficking activity.

The Court in *Bailey* states that Congress would have used the word "possess" if it had meant for possession of a firearm to constitute a violation of § 924(c)(1). *Id.* at 506. For that reason, "carry" must mean more than mere possession of a firearm. *See also, United States* v. *Plummer,* 964 F.2d 1251 (1st Cir. 1992) (mere possession of a gun during the course of criminal conduct will not support a conviction). In addition, if a word is not explicitly defined by statute, it should be given its ordinary meaning. *See, United States* v. *Manning.* ___ F.3d ___ (1st Cir. 1996), 1996 WL 116990 (3/21/96), *citing, Smith* v. *United States,* 113 S.Ct. 2050, 2054 (1993) (noting that words not defined by statute should be given their ordinary or common meaning). The Random House Dictionary of the English Language, Second Edition (1987), defines "carry" as follows: "to take or support from one place to another; convey; transport."

Defendant Cleveland contends that, after the decision announced in *Bailey,* "carry" must be interpreted to mean "on or about the defendant's person." Some circuits have required a showing that a firearm has been on or about the defendant's person in order to support liability under the "carry" prong of § 924(c)(1). *See e.g., United States* v. *Hernandez,* ___ F.3d ___ (9th Cir. 1996), 1996 WL 34822 (1/31/96) (gun found inside a locked toolbox during the drug trafficking crime was not "carried" under § 924(c)(1)); *and, United States* v. *White,* ___ F.3d ___, (8th Cir. 1996), 1996 WL 154228 (4/4/96) (court upheld defendant's conviction for "carrying" a firearm where gun was found under coat discarded by the defendant during flight from police). But, other circuits have required only that a firearm be accessible. *See e.g., United States* v. *Feliz-*

Cordero, 859 F.2d 250, 253 (2nd Cir. 1988) (a firearm is carried if it was "within reach during the commission of the drug offense"). Since the decision in *Bailey* was announced, no circuit has decided whether evidence of guns found in a bag in a locked trunk, along with evidence that the guns were acquired and transported for use in relation to the drug trafficking crime, is sufficient to support a conviction for "carrying" a firearm in violation of § 924(c)(1). *See e.g., United States* v. *Baker*, 78 F.3d 1241, 1247 (7th Cir. 1996) (court explicitly stated that its decision did not state an opinion "on whether a defendant who has drugs and a fully operable and loaded gun locked in the trunk of his car could be convicted under § 924(c)(1) for carrying a firearm"). In fact, consideration of the same issue was left to the Court of Appeals for the District of Columbia Circuit when the Supreme Court remanded *Bailey*.

I conclude that I cannot sustain defendant Cleveland's contention that "[i]n this Circuit, a § 924(c)(1) conviction for carrying has required that the weapon be immediately accessible." Defendant Cleveland's Memorandum in Support of Motion for Correction of Sentence (Docket No. 182), p.5. In both cases cited by defendant Cleveland for this proposition, the court was addressing the "in relation to" requirement of the statute and did not make a decision about the requirement for which Cleveland cites them. *See, United States* v. *Plummer*, 964 F.2d 1251, 1253-1254 (1st Cir. 1992) ("Defendant conceded that the presence of the gun in his vehicle was sufficient to establish . . . that he 'carried a firearm' [citations omitted]. Defendant argues, however, that the evidence was insufficient to establish . . . that he carried the gun 'in

relation to' . . . "); *and, United States* v. *Payero*, 888 F.2d 928, 929 (1st Cir. 1989) (where "[t]he only issue on appeal was whether the trial court correctly and adequately instructed the jury with respect to the 'during and in relation to' element [of] the statute").

In the First Circuit, two cases decided since *Bailey* have addressed the scope of "carry". In *United States* v. *Manning*, ___ F.3d ___ (1st Cir. 1996), 1996 WL 116990, 2 (3/21/96), the court did not define the "precise contours" of "carry", but held that "Manning's actions me[]t any reasonable contours of the 'carry' prong." In *Manning*, the defendant was observed carrying a briefcase into a garage. Shortly thereafter, a police officer found the briefcase that contained cocaine, a handgun and six pipebombs. In *United States* v. *Ramirez-Ferrer*, ___ F.3d ___ (1st Cir. 1996), 1996 WL 125595, 4 (3/27/96), the court, sitting en banc, vacated the defendants' convictions under the "use" prong, but required reconsideration by the panel on the "carry" prong "since *Bailey* has both limited the word 'use' to the extent that it cannot apply in the instant case and emphasized that 'carry' has meanings not covered by 'use' ". In *Ramirez-Ferrer* a loaded handgun was found covered by a t-shirt in a storage compartment near the location where one of the defendants had been sitting when the defendants' boat, in which they were transporting cocaine, was interdicted off the coast of Puerto Rico. *Id.* at 2. Both cases recognize that the ordinary meaning of "carry" includes transporting a firearm without actually holding it.

Before *Bailey*, courts in this circuit did not clearly distinguish between "use" and "carry" under § 924(c)(1). But, convictions for violations under § 924(c)(1) were

upheld where a firearm was found in a vehicle, but was not necessarily accessible to the defendant. In those cases the focus was on the "facilitative nexus" between the possession of the firearm and its role in the criminal activity. *See, United States* v. *Castro-Lara*, 970 F.2d 976, 983 (1st Cir. 1992); *and, United States* v. *Reyes-Mercado*, 22 F.3d 363 (1st Cir. 1994).

In *Castro-Lara*, the case most closely analogous to the one before this court, an unloaded firearm and live ammunition were found in a briefcase in the locked trunk of the defendant's car. Authorities apprehended the defendants when they were about to drive off carrying cocaine that they picked up at an airstrip. The court in *Castro-Lara* focused on the location of the firearm ("at the place where drugs were to be delivered") and the defendant's timing (the defendant "brought the gun to the airstrip in the course of taking delivery of . . . cocaine") in affirming the defendant's conviction. *Castro-Lara*, 970 F.2d at 983. The court held that the evidence was sufficient to show that the gun was "available for use in connection with the narcotics trade", rejected any requirement that the gun be on the defendant's person, and did not hold "instant availability" to be the critical concern. *Id.* The court in *Castro-Lara* also noted First Circuit cases in which a firearm found in a defendant's vehicle, but not on his person, was sufficient to support a conviction under § 924(c)(1). *Id.* The focus in those cases has been to distinguish from "mere possession", but not require that a defendant have actively employed a firearm. Although the interpretation of § 924(c)(1) in *Bailey* creates a requirement for "active employment" when there is an indictment for "use", the Court made it clear that "carry" must

be given a distinct and separate meaning. *Bailey*, 116 S.Ct. at 507.

The analysis in *Castro-Lara* is in accord with the Court's emphasis in *Bailey* on congressional intent that "require[s] more than possession to trigger the statute's application". *Id.* In *Bailey*, the Court decided what "more" means when there is an indictment for "use", but not when there is an indictment for "carry". The evidence is this case indicates that defendants Cleveland and Gray did more than merely possess the three guns. During the afternoon of October 18, 1994 defendants Cleveland and Gray planned to steal the cocaine, obtained guns that were placed in a bag in the trunk of the Mazda, and then transported the guns to the meeting with defendants Rodriguez and Vasquez. As in *Castro-Lara*, both the location of the guns (in the car they were using in their drug trafficking scheme) and defendant Cleveland's and defendant Gray's timing (obtaining the guns in order to steal the cocaine) indicates that defendants Cleveland and Gray controlled the guns and that the guns facilitated their attempt to possess cocaine. By their own admissions the guns had a central role in their scheme to possess some, if not all, of the cocaine being transported in the Isuzu.

The First Circuit cases cited above contrast with defendant Cleveland's contention that there is a requirement in this circuit that a firearm be on or about the defendant's person in order to support a finding of violation of § 924(c)(1). This circuit has consistently recognized the various ways that firearms may be carried in relation to a drug trafficking crime – whether by hand, in a briefcase, or somewhere in a vehicle. Recognizing that

often vehicles are used to carry both drugs and firearms, the Fifth Circuit has further defined "carry" in both the vehicle and non-vehicle contexts. *See, United States* v. *Pineda-Ortuno*, 952 F.2d 98 (5th Cir. 1992). In *Pineda-Ortuno*, the court held that the literal meaning of "carry" includes carriage by a vehicle, but easy access to a firearm is not a requirement as long as the defendant knowingly carried the firearm in the vehicle and did so in relation to a drug trafficking crime. *Id.* at 104. Defendants Cleveland and Gray admitted to obtaining the guns and, in the ordinary sense of the word, carried the guns in the Mazda.

E. "In relation to"

The Supreme Court has held that the "in relation to" language in § 924(c)(1) "clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith* v. *United States*, 113 S.Ct. 2050, 2059 (1993). It was no accident that there were three guns in the trunk of the Mazda. Defendants Cleveland and Gray obtained the guns for the purpose of stealing the cocaine from defendant Rodriguez and his associates. Therefore, the "in relation to" prong of the statute is met.

III. Conclusion

The evidence in the case now before this court is a prime example of using a vehicle to carry firearms in relation to a drug trafficking crime. Although *Bailey* restricts the definition of "use" under § 924(c)(1) and the

evidence does not support defendant Cleveland's guilty plea for "using" a firearm, the evidence does support his guilty plea for "carrying" a firearm. Defendant Cleveland drove the vehicle in which he and defendant Gray carried the guns in relation to their attempt to possess cocaine. That their plan made holding the guns impractical and that vehicles are commonly used for carrying both guns and drugs, only strengthen what is already sufficient evidence to support defendant Cleveland's guilty plea to count four of the second superseding indictment.

ORDER

For the reasons stated in the foregoing memorandum, it is ORDERED:

(1) Defendant Cleveland's Motion for Correction of Sentence or Other Appropriate Relief (Docket No. 181) is DENIED.

(2) The Clerk will deliver forthwith, to the Clerk of the Court of Appeals, a copy of this Memorandum and Order.

/s/ Robert E. Keeton
United States
District Judge

UNITED STATES DISTRICT COURT
District of Massachusetts

UNITED STATES OF AMERICA

v.

ENRIQUE GRAY-SANTANA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
1:94CR10292-003 REK

Norman Zalkind, Esq.
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) 3 and 5
[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	Attempt to possess cocaine with intent to distribute	10/18/1994	3
18 U.S.C. § 2	Aiding and abetting	10/18/1994	3,5
18 U.S.C. § 924(c)(1)	Carrying and using a firearm during and in relation to a drug trafficking crime	10/18/1994	5

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[X] Count(s) 1 is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
054-33-4001

Defendant's Date of Birth:
05/08/1965

Defendant's USM No.:
20341-038

Defendant's Residence Address:

Boston MA 02109

Defendant's Mailing Address:

Boston MA 02109

05/21/1996
Date of Imposition of Judgment

/s/ Robert E. Keeton
Signature of Judicial Officer

Robert E. Keeton
United States District Judge
Name & Title of Judicial Officer

June 4, 1996
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 120 month(s).

On Count 3. On Count 5, 60 months in the custody of the Bureau of Prisons consecutive to the period in custody under Count 3.

The defendant is to be credited with the time in custody since October 18, 1994 to the present.

[X] The court makes the following recommendations to the Bureau of Prisons:

That, if feasible, defendant be placed in a Bureau of Prisons facility in the New York City area to facilitate family visits.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at ___ a.m./p.m. on ___.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 60 month(s).

On Count 3, to commence upon release from custody under Count 5 of this sentence. On Count 5, 60 months to be served concurrently with the period under Count 3.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall

submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such

* * *

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 100.00	$	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement .... $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  [ ] The interest requirement is waived.
  [ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $_____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the costs of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the

Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made

* * *

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See Amended Memorandum of Sentencing Hearing and Report of Statement of Reasons attached.

Guideline Range Determined by the Court:

Total Offense Level: 29

Criminal History Category: I

Imprisonment Range: 180 to 195 months

Supervised Release Range: 5 to 5 years

Fine Range: $ 15,000.00 to $ 4,250,000.00

[X] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ 0.00

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a

restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO.
V.	)	94-10292-003-REK
	)	
ENRIQUE GRAY-SANTANA	)	
	)	

NOTICE OF APPEAL
June 4, 1996

KEETON, D.J.

Now comes the defendant, Enrique Gray-Santana, and hereby appeals from the Judgment and Commitment Order this date.

By the Court:

By: /s/ Joanne M. Cull
Joanne M. Cull
Deputy Clerk

UNITED UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES, Appellee v. ENRIQUE GRAY-SANTANA and DONALD CLEVELAND, Defendants-Appellants	Case Nos. 96-1659; 96-1043; 96-1669

STATEMENT OF ISSUES

1. Whether the district court erred in denying the defendants' motion to suppress evidence seized during searches of two vehicles, where law enforcement officers exceeded the scope of a *Terry* stop and lacked probable cause for a warrantless arrest or search.

2. Whether the district court erred in denying the motion to suppress Mr. Gray's statement, where DEA investigators interrogated him following his invocation of his right to counsel and thereafter ignored his repeated requests for counsel, and where this statement was not made voluntarily.

3. Whether the district court erred in holding that the defendants "carried" a weapon during and in relation to a drug trafficking offense within the meaning of 18

U.S.C. §924(c), where the firearms in question were located in the closed and locked trunk of an automobile.

Respectfully submitted,

/s/ Norman Zalkind (ISB)
Norman S. Zalkind (#538880)
Inga S. Bernstein (#627251)
ZALKIND, RODRIGUEZ,
LUNT & DUNCAN
65a Atlantic Avenue
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(617) 742-6020

/s/ John H. Cunha (ISB)
John H. Cunha (#108580)
SALSBERG, CUNHA,
& HOLCOMB
20 Winthrop Square
Boston, MA 02110
(617) 338-1590

I certify that I have this day caused to be served by hand-delivery a copy of this document on all counsel of record,

/s/ Inga S. Bernstein

July 31, 1996

United States Court of Appeals
For the First Circuit

No. 96-1043
No. 96-1669

UNITED STATES OF AMERICA,
Appellee,
v.
DONALD E. CLEVELAND,
Defendant, Appellant.

No. 96-1128

UNITED STATES OF AMERICA,
Appellee,
v.
RAMON E. VASQUEZ,
Defendant, Appellant.

No. 96-1659

UNITED STATES OF AMERICA,
Appellee,
v.
ENRIQUE GRAY-SANTANA,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Robert E. Keeton, *U.S. District Judge*]

Before
Boudin, *Circuit Judge*,
Campbell, *Senior Circuit Judge*,
and Bownes, *Senior Circuit Judge*.

Inga S. Bernstein and *John H. Cunha*, by Appointment of the Court, with whom *Norman S. Zalkind, Zalkind, Rodriguez, Lunt & Duncan* and *Salsberg, Cunha & Holcomb, P.C.* were on consolidated briefs, for appellants Enrique Gray-Santana and Donald E. Cleveland.

Oliver C. Mitchell, Jr., with whom *Donnalyn B. Lynch Kahn* and *Goldstein & Manello, P.C.* were on brief for appellant Ramon E. Vasquez.

Andrea Nervi Ward, Assistant United States Attorney, with whom *Donald K. Stern*, United States Attorney, was on briefs for the United States.

February 18, 1997

CAMPBELL, Senior Circuit Judge. Ramon E. Vasquez appeals from his conviction by a jury for conspiracy to possess cocaine with intent to distribute in violation of 21

U.S.C. § 846 and for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841. He contends that the district court erred in denying his motion to suppress certain physical evidence and in omitting "hesitate to act" language from its reasonable doubt instruction.

Enrique Gray-Santana and Donald Cleveland, who were Vasquez's co-defendants, pleaded guilty to attempting to possess cocaine with intent to distribute in violation of 21 U.S.C. §§ 846 and 841(a) and to carrying or using a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). As their guilty pleas permit, they now appeal from the district court's denials of their motions to suppress and motions in limine. They also appeal from the district court's denial of relief from their § 924(c)(1) convictions for carrying or using a firearm in relation to a drug crime. They argue that their guilty pleas and convictions should be invalidated under *Bailey* v. *United States*, ___ U.S. ___, 116 S. Ct. 501 (1995), a decision handed down by the Supreme Court shortly after acceptance of their guilty pleas.

I. Background

Most of the facts are not in dispute. Gray-Santana ("Gray"), a resident of New York City, arranged to secure five . . . (not a present appellant). Gray intended to sell the cocaine through other contacts he had in Boston, so he arranged to take delivery in Boston.

On the morning of October 18, 1994, Gray travelled by bus to Boston, planning to meet Cleveland. Cleveland picked Gray up in a rented white Mazda 929 he had

borrowed from a friend and took him to his house. There, Cleveland and Gray placed three loaded handguns inside a Louis Vuitton duffel bag and put the bag inside the Mazda's trunk. The two planned to use the guns to rob their suppliers of their cocaine. At around 4 p.m., Cleveland and Gray were paged by Rodriguez. They then left in the Mazda to meet Rodriguez in the Symphony Hall area of Boston.

At this time, the Drug Enforcement Administration was investigating one Juan Pagan. The DEA had information that Pagan was shipping large amounts of cocaine from Puerto Rico to New England. On October 17, 1994, heightened phone activity led DEA Agents to begin physical surveillance, including videotaping, of the Connecticut apartment complex where Juan Pagan resided. Around noon on October 18, 1994, two cars arrived at the complex. The first was a Lexus, driven by William Acosta with Vasquez in the back seat. The second was a Lincoln, driven by Rodriguez.

After the cars parked, Rodriguez handed Acosta a black bag and then Acosta took the bag up to Pagan's apartment. Vasquez, carrying a cellular phone, got out of the Lexus and sat with Rodriguez in the Lincoln. After ten or fifteen minutes, Acosta came back and spoke to Vasquez, prompting Vasquez and Rodriguez to leave the complex in a brown Oldsmobile driven by one Jorge Quinones. An hour or so later, Vasquez returned in the Oldsmobile, followed by Rodriguez in a white Isuzu Trooper.

The DEA had received information from two confidential sources that Pagan used a white Isuzu Trooper in

his drug operations. These informants had also told the DEA that some of Pagan's vehicles had hidden compartments used to hold drugs. One of the informants had stated that Pagan's white Isuzu Trooper had such a hidden compartment under the rear seat.

After the Isuzu arrived, Acosta and Rodriguez were observed examining its back seat area. Acosta then left, driving the Lexus with Vasquez in the back seat. Rodriguez followed them in the Isuzu. The two cars drove to Boston on major highways, staying close to 55 miles per hour. DEA agents followed them the entire way.

After the caravan arrived in the Symphony Hall area of Boston, Acosta and Rodriguez parked the cars. Acosta then used the Lexus to guide Cleveland and Gray, who had arrived in the Mazda, to where the Isuzu was parked. Acosta drove away, and Vasquez was next observed sitting in the back seat of the Mazda. Gray exited the Mazda and got into the Isuzu. Vasquez got into the front seat of the Mazda.

The two cars began to drive off. At this point, the DEA agents blocked them. The agents ordered the occupants of both cars to exit their vehicles and handcuffed them. The agents then moved the suspects and their cars out of traffic to a nearby parking lot.

The agents searched the Isuzu and found six kilograms of cocaine in a concealed compartment underneath the back seat. They then searched the Mazda and found the bag in the trunk containing the three guns, rope and duct tape. At that point, the four men were told they were under arrest.

A few hours after his arrest, while he was in custody, Gray gave a statement to DEA agent Bruce Travers confessing to participation in the events described above.

Vasquez filed a motion to suppress the physical evidence found on his person at the time of his arrest. The district court denied his motion. Vasquez was tried by a jury and convicted of conspiracy to possess cocaine with intent to distribute and of possession of cocaine with intent to distribute. The court sentenced him to 121 months in prison.

Cleveland and Gray eventually pled guilty to attempting to possess cocaine with intent to distribute and to carrying or using a firearm during and in relation to a drug trafficking crime, subject to their right to appeal any adverse ruling by the district court on their motions to suppress physical evidence and to suppress Gray's post-arrest statement. The district court denied their motions and sentenced each of them to 180 months in prison and 60 months of supervised release.[1] After the Supreme Court came down with its *Bailey* decision, 116 S. Ct. 501, Cleveland and Gray moved in the district court for relief from the conviction for carrying or using a firearm in relation to a drug trafficking crime. The court denied that motion.

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[1] Rodriguez pleaded guilty to conspiracy and possession charges and was also sentenced to 120 months in prison and 60 months of supervised release.

II. Vasquez

A. The Search of Vasquez's Person:

In his first point of error, Vasquez argues that the district court erred in denying his motion to suppress the physical evidence the agents found on his person. This included a pager, address book, business cards, and notes tying Vasquez to the other defendants. He contends that a wrongful de facto arrest occurred when he was initially ordered out of the Mazda and handcuffed. (Only later was Vasquez told he was under arrest and thereafter searched, by which time the cocaine had been discovered in the Isuzu.) Because the initial de facto arrest was allegedly without probable cause, Vasquez argues that it was illegal and that it tainted all subsequent events, causing the later search of his person to violate the Fourth Amendment.

The district court held, however, and we agree, that the agents had probable cause to arrest Vasquez at the time they ordered him out of the Mazda and handcuffed him. Accordingly, regardless of whether the arrest occurred then or later, the arrest was legal and the subsequent search of his person was proper. "[I]t is well established that '[i]f an arrest is lawful, the arresting officers are entitled to search the individual apprehended pursuant to that arrest.' " *United States* v. *Torres-Maldonado*, 14 F.3d 95, 105 (1st Cir.) (quoting *United States* v. *Uricoechea-Casallas*, 946 F.2d 162, 165 (1st Cir. 1991)), *cert. denied*, 115 S. Ct. 193 (1994).

"Law enforcement officers may effect warrantless arrests provided that they have probable cause to believe that the suspect has committed or is committing a crime."

United States v. *Martinez-Molina*, 64 F.3d 719, 726 (1st Cir. 1995) (citing *United States* v. *Watson*, 423 U.S. 411, 416-18 (1976); *Gerstein* v. *Pugh*, 420 U.S. 103, 113-14 (1975)). "[The government] need only show that, at the time of the arrest, the facts and circumstances known to the arresting officers were sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense." *Torres-Maldonado*, 14 F.3d at 105. *See also Beck* v. *Ohio*, 379 U.S. 89, 91 (1964).

"Of course, probable cause must exist with respect to each person arrested, and 'a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.' " *Martinez-Molina*, 64 F.3d at 726 (quoting *Ybarra* v. *Illinois*, 444 U.S. 85, 91 (1979)). "[C]ases in which courts find that probable cause exists generally involve substantially more than a momentary, random, or apparently innocent association between the defendant and the known criminal activity." *Martinez-Molina*, 64 F.3d at 727 (discussing cases).

Here, prior to seizing Vasquez, the agents had been investigating Pagan and his drug trafficking operations for several years. Before the events of this case, the agents had learned from informants that Pagan was trafficking in kilogram quantities of cocaine, shipping it from Puerto Rico to Hartford, Connecticut and Springfield, Massachusetts. The agents had learned that Pagan used couriers to transport the cocaine. Some of Pagan's couriers had been arrested at the San Juan airport with several kilograms of cocaine in their luggage and had admitted to working for Pagan.

Two confidential informants who had each proved reliable in related matters had told DEA agents that among the many vehicles Pagan used to transport drugs and money was a white Isuzu Trooper. They each also related that Pagan's transport vehicles often had a concealed, electronically-controlled compartment used to hide whatever was being moved. One of them asserted that he had seen that the white Isuzu Trooper had such a compartment in the floor under the rear seat.

The agents had also learned from one of the informants and from other sources that Pagan's girlfriend lived in apartment D-219 at the Connecticut apartment complex and that Pagan used that apartment in his drug activities. The apartment was listed under the name "J. Pagan." The DEA had installed a pen register on the apartment's phone so they could track calls made to and from that number.

On October 17, 1994, the pen register revealed a sharp increase in phone activity from the Connecticut apartment. Some of the numbers being called matched cellular phone and beeper numbers that the agents knew belonged to Pagan's previously identified drug associates. The agents decided to begin physical surveillance of the Connecticut apartment. This surveillance included agents stationed around the apartment complex and two agents who were equipped with a video camera in an apartment that had a view of Pagan's apartment.

A little after noon on October 18th, the agents observed a Lexus and a Lincoln Town Car enter the apartment's parking lot. The various movements of people and vehicles that followed, coupled with the DEA's

information about Pagan's drug dealing, strongly indicated that a drug transaction was taking place. Acosta, who had been driving the Lexus, entered Pagan's apartment building followed by Rodriguez, carrying a large black shoulder bag. Rodriguez handed this bag to Acosta in the building's lobby. Later on, the agents saw Acosta talking to Pagan on Pagan's balcony.

Vasquez exited the Lexus and walked over to Rodriguez and the Lincoln carrying a cellular phone, one of the "well known tools of the drug trade." *United States* v. *De La Cruz*, 996 F.2d 1307, 1311 (1st Cir.), *cert. denied*, 510 U.S. 936 (1993). *See also Martinez-Molina*, 64 F.3d at 728. Vasquez waited with Rodriguez inside the Lincoln until Acosta came out with another man, Jorge Quinones, and spoke to Vasquez. Then Quinones left, returning shortly in a brown Oldsmobile. Vasquez and Rodriguez got into the Oldsmobile and drove out of the complex.

An hour or so later Vasquez and Quinones returned, followed by Rodriguez in a white Isuzu Trooper, exactly the car the agents had been told Pagan used to transport drugs and drug proceeds. It was also the vehicle said to have a hidden compartment for drugs and money in the floor under the rear seat. While Pagan stood on his balcony overlooking the parking lot, Acosta and Rodriguez were seen to be looking into the Isuzu's back seat area, where the secret compartment was said to be located.

At this point, the agents had probable cause to believe that Vasquez, Rodriguez, Acosta, Pagan, and Quinones were involved in a drug transaction, with the Isuzu Trooper likely bearing the contraband. Rather than

arrest the suspects immediately, the agents chose to follow the Isuzu Trooper and the Lexus as they drove to Boston.

What happened thereafter – beginning with the drive in tandem to Boston and ending with the agents' intervention – was wholly consistent with the existence of an unfolding drug transaction and Vasquez's active involvement. Vasquez and Rodriguez stood on a Boston street corner, apparently checking the area for police. Later, and after the agents had seen Acosta speak to Cleveland and Gray, the agents spotted Vasquez inside the Mazda, to which he had moved from the Lexus. Vasquez was still inside the Mazda with Cleveland when the agents stopped the vehicles and ordered everyone out.

By this time, the agents had abundant evidence to constitute probable cause that Vasquez was involved in an ongoing drug trafficking crime and that his association with the other suspects was not momentary, random, or innocent. They had authority, therefore, at the time he was ordered from the Mazda and handcuffed, to arrest Vasquez. The district court did not err in refusing to suppress the various items later found on Vasquez's person when he was searched.

B. The Reasonable Doubt Instruction:

Vasquez asserts that the district court erred in refusing to include "hesitate to act" language in its reasonable doubt instruction. In particular, Vasquez insists that, upon his objection to the omission, the court should have complied with his request to tell the jury, "When we talk about a reasonable doubt, we mean a doubt based upon

reason and common sense, the kind of doubt that would make a reasonable person hesitate to act."

The short answer to this argument is that this court has explicitly held that a district court's refusal to include "hesitate to act" language in its explanation of reasonable doubt to the jury does not constitute reversible error. *See United States* v. *Vavlitis*, 9 F.3d 206, 212 (1st Cir. 1993); *United States* v. *O'Brien*, 972 F.2d 12, 15 (1st Cir. 1992). Although we accepted an instruction that included such language in *United States* v. *Drake*, 673 F.2d 15, 21 (1st Cir. 1982), we have also criticized the "hesitate to act" formulation. *See Gilday* v. *Callahan*, 59 F.3d 257, 264 (1st Cir. 1995) (characterizing the "hesitate to act" language as "arguably unhelpful"), *cert. denied*, 116 S. Ct. 1269 (1996); *O'Brien*, 972 F.2d at 15-16 (criticizing instructions such as the "hesitate to act" formulation which compare reasonable doubt to the decisional standard used by individual jurors in their own affairs as trivializing the constitutionally required burden of proof).

The Supreme Court has stated that the Constitution does not require district courts to define reasonable doubt, nor does it require trial courts who do choose to explain the term to employ "any particular form of words . . . in advising the jury of the government's burden of proof." *Victor* v. *Nebraska*, 511 U.S. 1, 5 (1994). "Rather, 'taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.' " *Id.* (quoting *Holland* v. *United States*, 348 U.S. 121, 140 (1954)).

In instructing the jury on reasonable doubt, the district court stated:

As I have said, the burden is upon the Government to prove beyond a reasonable doubt that a defendant is guilty of the charge made against the defendant. It is a strict and heavy burden, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. It does require that the evidence exclude any reasonable doubt concerning a defendant's guilt.

A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Reasonable doubt exists when, after weighing and considering all the evidence, using reason and common sense, jurors cannot say that they have a settled conviction of the truth of the charge.

Of course, a defendant is never to be convicted on suspicion or conjecture. If, for example, you view the evidence in the case as reasonably permitting either of two conclusions – one that a defendant is guilty as charged, the other that the defendant is not guilty – you will find the defendant not guilty.

It is not sufficient for the Government to establish a probability, though a strong one, that a fact charged is more likely to be true than not true. That is not enough to meet the burden of proof beyond reasonable doubt. On the other hand, there are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.

Concluding my instructions on the burden, then, I instruct you that what the Government must do to meet its heavy burden is to establish the truth of each part of each offense charged by proof that convinces you and leaves you with no

reasonable doubt, and thus satisfies you that you can, consistently with your oath as jurors, base your verdict upon it. If you so find as to a particular charge against a defendant, you will return a verdict of guilty on that charge. If, on the other hand, you think there is a reasonable doubt about whether the defendant is guilty of a particular offense, you must give the defendant the benefit of the doubt and find the defendant not guilty of that offense.

This explanation correctly conveyed the concept of reasonable doubt to the jury.

III. Cleveland and Gray

A. The Vehicle Searches:

In their first point of error, Cleveland and Gray argue that the district court erred in refusing to grant their motion to suppress the evidence found in the agents' search of the Isuzu Trooper and of the Mazda.

"A police officer may effect a warrantless search of the interior of a motor vehicle on a public thoroughfare as long as he has probable cause to believe that the vehicle contains contraband or other evidence of criminal activity." *United States* v. *Staula*, 80 F.3d 596, 602 (1st Cir.), *cert. denied*, 117 S. Ct. 156 (1996). *See also California* v. *Acevedo*, 500 U.S. 565, 570 (1991); *Chambers* v. *Maroney*, 399 U.S. 42, 46-52 (1970); *United States* v. *Martinez-Molina*, 64 F.3d 719, 730 (1st Cir. 1995). When the police have probable cause to search a vehicle, they may also search closed containers within that vehicle. *See Acevedo*, 500 U.S. at 569-81.

Even assuming that Cleveland and Gray have standing to contest the searches in this case, a problematic proposition in itself, the agents clearly had probable cause to search the vehicles. As explained in Part II-A, above, by the time the agents stopped the two cars, they had probable cause to believe that the defendants were involved in a drug transaction and that the Trooper contained contraband. The movements of the Mazda in following the Lexus to rendezvous with the Isuzu, when combined with the exchange of personnel – Gray moving into the Isuzu and Vasquez entering the Mazda – provided the agents with probable cause to believe that Cleveland and Gray were also involved in the drug transaction and that the Mazda contained contraband. The warrantless search thus did not violate the Fourth Amendment, and the district court did not err in refusing to suppress the evidence found in the two vehicles.

B. Gray's Statement:

In the next point of error, Gray asserts that the district court should have suppressed the statement he made to Agent Travers in the DEA office after his arrest. Gray claims that he had invoked his right to counsel before making the statement and that the agents coerced the statement from him through intimidation.

The district court, after holding two evidentiary hearings at which it heard the testimony of Gray, Agent Travers, and another agent present at DEA headquarters the night of Gray's arrest, concluded that Gray's various allegations of coercive activity by the agents were not credible. The court also found that Gray had initiated the

conversation with the agents that led to his confession by knocking on the door of his cell. Gray then told Agent Travers that he wished to speak with him about the events leading up to his arrest and signed a written waiver of his rights. After examining the record, we believe that these findings of fact by the district court were not clearly erroneous. *See United States* v. *Valle*, 72 F.3d 210, 213-14 (1st Cir. 1995) ("In reviewing orders granting or denying suppression motions, this court scrutinizes a district court's factual findings, including its credibility determinations, for traces of clear error.").

In this case, as in *Valle*, "whether or not to suppress the challenged statements boils down to a credibility call" and "[s]uch calls are grist for the district court's mill." *Valle*, 72 F.3d at 214. Since Gray initiated the contact with the agents that led to his statement after he had invoked his right to counsel, the district court was correct to deny the motion to suppress. *See Edwards* v. *Arizona*, 451 U.S. 477, 484-86 (1981) (holding that once a defendant has asked for an attorney, she is not subject to further interrogation by the police until after counsel has been made available to her unless she herself initiates further communication with the authorities); *United States* v. *Fontana*, 948 F.2d 796, 805-06 (1st Cir. 1991) (noting that initiation of interrogation by the accused has been broadly interpreted); *Watkins* v. *Callahan*, 724 F.2d 1038, 1042 (1st Cir. 1984) (stating that "an accused is not powerless to countermand an election to talk to counsel").

Similarly, we find no clear error in the district court's determination that the agents did not commit the coercive acts alleged by Gray. *See United States* v. *Burns*, 15 F.3d 211, 216 (1st Cir. 1994) ("Although the ultimate issue

of voluntariness is a question of law subject to plenary review, we will accept the district court's subsidiary findings of fact unless they are 'clearly erroneous.' ").

Based on the facts as found by the district court, the court's holding that Gray's statement was voluntary and therefore admissible at trial under 18 U.S.C. § 3501 was proper.

The court applied the totality of the circumstances test mandated by 18 U.S.C. § 3501(b), paying particular attention to the factors identified by that section.[2] Gray gave his statement within six hours of his arrest, bringing

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[2] 18 U.S.C. § 3501(b) states:

> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

this case within the rule of § 3501(c).[3] The court found that Gray knew the nature of the offense of which he was suspected at the time he made the confession; knew that he was not required to make any statement and that any statement he did make could be used against him; and had been advised prior to the questioning of his right to the assistance of counsel. The court acknowledged that Gray had been without the assistance of counsel when he gave his statement, but held that in this case, this fifth factor was heavily outweighed by the other four factors and by the case's particular circumstances.

We agree with the district court that Gray's statement was voluntary.

C. The "Carry" Issue:

Cleveland and Gray pleaded guilty to violating 18 U.S.C. § 924(c)(1). That statute imposes a five-year prison term on anyone who, "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm." 18 U.S.C. § 924(c)(1). After the Supreme Court's opinion in *Bailey*, they both sought revocation of their convictions based on guilty pleas to

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[3] 18 U.S.C. § 3501(c) states, in relevant part:

> (c) In any criminal prosecution by the United States . . . a confession made or given by a person who is a defendant therein, while such person was under arrest . . . shall not be inadmissible solely because of delay in bringing such person before a magistrate . . . if such confession was made or given by such person within six hours immediately following his arrest or other detention. . . .

the § 924(c)(1) charges. Gray, against whom judgment had not yet entered, filed an unsuccessful Motion to Correct Sentence under Fed. R. Crim. P. 35(c), and Cleveland, against whom judgment had entered and whose direct appeal was already pending, filed an equally unavailing motion under 28 U.S.C. § 2255. The various appeals were consolidated. The government does not dispute our jurisdiction to consider on the merits Cleveland and Gray's claims that their guilty pleas are invalid in light of *Bailey*. Since we reject those claims, we do not address any potential jurisdictional question stemming from Cleveland's § 2255 appeal.

The broad definition of "use" formerly employed by this circuit and under which Cleveland and Gray pleaded guilty was unanimously disapproved by the Supreme Court in *Bailey*. Stating the need to interpret statutory terms in accordance with their "ordinary or natural" meaning, the Court relied on the dictionary definition of "use" in holding that a conviction under the "use" prong of the statute could only be upheld if the defendant "actively employed the firearm during and in relation to the predicate crime." *Bailey*, 116 S. Ct. at 506-09. Mere possession or storage of the weapon is insufficient. *Id.* at 508-09.

Under *Bailey*, Cleveland and Gray cannot be convicted under § 924(c)'s "use" prong. The guns remained in the Mazda's trunk throughout the events in question; neither Cleveland nor Gray "actively employed" the firearm. Their guilty pleas might still, however, be upheld under the statute's "carry" prong.

While *Bailey* did not address the requirements relative to "carry," the Supreme Court stated that part of its rationale for defining "use" more narrowly was to preserve a separate, nonsuperfluous meaning for "carry." *Bailey*, 116 S. Ct. at 507. The Court wrote, "Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction." *Id.* at 507. The Court remanded the case for a determination of whether a defendant could be convicted under the "carry" prong either for having a gun inside a bag in a locked car trunk or for having an unloaded firearm in a locked footlocker inside a bedroom closet. *Id.* at 509.

Bailey leaves us with two questions concerning the proper interpretation of "carry." First, must a firearm be on a suspect's person to be "carried" or can one also "carry" a firearm in a vehicle? Second, if one can "carry" a firearm in a vehicle, must the weapon be immediately accessible to the defendant to be "carried"?

The first question is easily answered. We have already held post-*Bailey* that a firearm can be "carried" in a boat, a conveyance that seems indistinguishable for present purposes from a land vehicle like a car. *United States* v. *Ramirez-Ferrer*, 82 F.3d 1149 (1st Cir.), *cert. denied*, 117 S. Ct. 405 (1996).

This result accords both with our pre-*Bailey* "carry" cases and with the holdings of the other circuits to have considered this issue post-*Bailey*. *See, e.g., United States* v.

Plummer, 964 F.2d 1251, 1252-54 (1st Cir.) (acknowledging the defendant-driver's concession that the presence of a gun in his vehicle either in the driver's seat or on the front passenger seat was sufficient to establish that he had "carried" a gun under § 924(c)(1)), *cert. denied*, 506 U.S. 926 (1992); *United States* v. *Eaton*, 890 F.2d 511, 511-12 (1st Cir. 1989) (acknowledging the defendant's concession that he had "carried" a gun for the purposes of § 924(c)(1) when the gun had been under the front seat of the truck he was driving), *cert. denied*, 495 U.S. 906 (1990); *United States* v. *Giraldo*, 80 F.3d 667, 677-78 (2d Cir.) (upholding a § 924(c)(1) conviction for "carrying" a gun in a car), *cert. denied*, 117 S. Ct. 135 (1996); *United States* v. *Mitchell*, No. 95-5792, 1997 WL 12115, at *2-4 (4th Cir. Jan. 15, 1997) (same); *United States* v. *Fike*, 82 F.3d 1315, 1327-28 (5th Cir.) (stating that a gun may be "carried" in a car), *cert. denied*, 117 S. Ct. 241-42 (1996); *United States* v. *Riascos-Suarez*, 73 F.3d 616, 623 (6th Cir.) (same), *cert. denied*, 117 S. Ct. 136 (1996); *United States* v. *Molina*, 102 F.3d 928, 930-32 (7th Cir. 1996) (same); *United States* v. *Willis*, 89 F.3d 1371, 1377-79 (8th Cir.) (same), *cert. denied*, 117 S. Ct. 273 (1996); *United States* v. *Staples*, 85 F.3d 461, 464 (9th Cir.) (same), *cert. denied*, 117 S. Ct. 318 (1996); *United States* v. *Miller*, 84 F.3d 1244, 1256-61 (10th Cir.) (same), *cert. denied*, 117 S. Ct. 443 (1996); *United States* v. *Farris*, 77 F.3d 391, 395 (11th Cir.) (upholding a § 924(c)(1) conviction for "carrying" a gun in a car), *cert. denied*, 117 S. Ct. 241 (1996).

On the second question, we agree with the Fourth, Seventh and Tenth Circuits that a gun may be "carried" in a vehicle for the purposes of § 924(c)(1) without necessarily being immediately accessible to the defendant

while it is being transported. *See Miller*, 84 F.3d at 1260; *Molina*, 102 F.3d at 930-32; *Mitchell*, at *3.

Since *Bailey*, this Circuit has twice faced questions concerning the scope of the statute's "carry" prong. In *United States* v. *Manning*, 79 F.3d 212 (1st Cir.), *cert. denied*, 117 S. Ct. 147 (1996), we held that carrying a briefcase containing a gun, pipe bombs, drugs, and drug paraphernalia was sufficient to fulfill the "carry" requirement. In *Ramirez-Ferrer*, already noted, we held that a loaded revolver covered by a T-shirt within the defendant's reach on a cocaine-laden boat upon which the defendant was travelling was being "carried" for the purposes of § 924(c)(1). In neither case, however, did we have to decide whether a firearm in a vehicle in which a defendant is travelling needs to be within easy reach to be "carried" for the purposes of § 924(c)(1).

Since some circuits have, since *Bailey*, continued to rely upon their pre-*Bailey* "carry" case law, we look at ours as well, but find no case that is entirely on point. *See, e.g.*, *United States* v. *Castro-Lara*, 970 F.2d 976, 982-83 (1st Cir. 1992) (upholding a conviction under § 924(c)(1) when the gun was in a briefcase in a locked car trunk without specifying whether the conviction was under the statute's "use" or "carry" prong), *cert. denied*, 508 U.S. 962 (1993); *Plummer*, 964 F.2d at 1252-54 (acknowledging the defendant-driver's concession that the presence of a gun in his vehicle either in the driver's seat or on the front passenger seat was sufficient to establish that he had "carried" a gun under § 924(c)(1)); *Eaton*, 890 F.2d at 511-12 (acknowledging the defendant's concession that he had "carried" a gun for the purposes of § 924(c)(1) when the

gun had been under the front seat of the truck he was driving).

"When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith* v. *United States*, 508 U.S. 223, 228 (1993). In *Bailey*, the Supreme Court turned to the dictionary for help in determining the meaning of "use," *Bailey*, 116 S. Ct. at 506, so we do the same with "carry."

Webster's Third New International Dictionary of the English Language Unabridged 343 (3d ed. 1971) defines "carry" as, "1: to move while supporting (as in a vehicle or in one's hands or arms): move an appreciable distance without dragging: sustain as a burden or load and bring along to another place."*Webster's* goes on to list many other definitions of the word and then, in differentiating "carry" from some of its synonyms, states:

> CARRY indicates moving to a location some distance away while supporting or maintaining off the ground. Orig. indicating movement by car or cart, it is a natural word to use in ref. to cargoes and loads on trucks, wagons, planes, ships, or even beasts of burden.

Id. This definition, therefore, clearly includes the transport of a firearm by car; the concept of whether or not the carried item is within reach plays no part in the definition.

Black's Law Dictionary 214 (6th ed. 1990) defines "carry" as, "To bear, bear about, sustain, *transport*, remove, or *convey*. To have or bear upon or about one's person, as a watch or weapon; locomotion not being essential. . . . " (emphasis supplied). However, *Black's*

defines the specific phrase "carry arms or weapons" more narrowly as, "To wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." *Id.*

The latter *Black's* definition of "carry arms or weapons" limits "carrying" to the defendant's person and so at least implies accessibility. However, even the circuits which have read an immediate accessibility requirement into "carry" under § 924(c)(1) have never limited the statutory language to "carrying" a firearm on the person. Indeed, such circuits, like the others to confront the issue, have all upheld convictions for "carrying" a weapon in a car. *See United States* v. *Cruz-Rojas*, 103 F.3d 283, 286 (2d Cir. 1996) (remanding two "carry" convictions to determine if a gun under a car's dashboard was accessible to either defendant); *Riascos-Suarez*, 73 F.3d at 623 (upholding a "carry" conviction when the gun was in a car near the driver's seat); *United States* v. *Willett*, 90 F.3d 404, 406-07 (9th Cir. 1996) (holding that a gun transported in a car was "carried" because it was easily accessible).

We strongly doubt – given the omnipresence of automobiles in today's world and in drug dealing, and given the basic meaning of "carry" as including transport by vehicle – that Congress, in prescribing liability for anyone who "uses or carries" a firearm during or in relation to a drug trafficking offense, meant to exclude a defendant who transports the gun in his car, rather than on his person, for use in a drug transaction. Hence the *Black's*

Law Dictionary restricted definition of the phrase "carry arms or weapons" seems inapposite here.

It is true, of course, that to come under § 924(c)(1), "the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith*, 508 U.S. at 238. In certain circumstances, a firearm's immediate accessibility to a defendant might be relevant to determining whether or not he was carrying it "during and in relation to" a drug trafficking crime, as the statute requires. 18 U.S.C. § 924(c)(1). But a firearm need not always be instantly accessible in order to be carried "during and in relation to" a drug trafficking crime. Here, the evidence shows that the defendants had placed the three firearms in question in the Mazda's trunk and, when arrested, were carrying them for the purpose of using them to rob their suppliers during the ongoing drug trafficking crime. Evidence of this purpose plainly demonstrated the necessary nexus to the drug trafficking offense wholly apart from whether the guns were within the immediate reach of those seated in the car at the time they were stopped by the agents.

As noted above, the Fourth, Seventh, and Tenth Circuits have held that a gun does not need to be readily accessible to be "carried" in a vehicle. *See Mitchell*, at *2-4; *Molina*, 102 F.3d at 930-32; *Miller*, 84 F.3d at 1256-61.

Other circuits, while not explicitly deciding the issue one way or the other, appear to be leaning toward adopting the same approach. *See United States* v. *Pineda-Ortuno*, 952 F.2d 98, 103-04 (5th Cir.) (a pre-*Bailey* case holding that the circuit's cases requiring a showing that the gun

was within the defendant's reach during the commission of the drug offense did not apply when the gun was "carried" in a vehicle), *cert. denied*, 504 U.S. 928 (1992); *United States* v. *Fike*, 82 F.3d 1315, 1327-28 (5th Cir. 1996) (a post-*Bailey* case upholding a defendant's conviction under § 924(c)(1) for "carrying" a gun that was within his reach in a car but not stating that accessibility was a requirement); *United States* v. *Rivas*, 85 F.3d 193, 194-96 (5th Cir.) (same), *cert. denied*, 117 S. Ct. 593 (1996); *United States* v. *Willis*, 89 F.3d 1371, 1377-79 (8th Cir. 1996) (relying on pre-*Bailey* case law to hold that transporting a firearm in the passenger compartment of a vehicle satisfies the "carry" prong of § 924(c)(1) but not addressing the weapon's accessibility); *United States* v. *Caldwell*, 97 F.3d 1063, 1068-70 (8th Cir. 1996) (upholding a conviction under § 924(c)(1)'s "carry" prong for a case in which the defendant's gun was in a car's hatchback, an area the court regarded as within the car's occupants' reach); *United States* v. *Farris*, 77 F.3d 391, 395 (11th Cir. 1996) (relying on pre-*Bailey* case law to uphold a § 924(c)(1) conviction for a defendant who was sitting in the back seat of a car while the firearm in question was in the glove compartment but not discussing whether the defendant could easily have reached the gun).

We recognize that the Second, Sixth, and Ninth Circuits have taken a contrary position, requiring that the firearms be immediately accessible. *See Giraldo*, 80 F.3d at 676-78; *Riascos-Suarez*, 73 F.3d at 623-24; *Staples*, 85 F.3d at 464. We find the reasoning of these courts unpersuasive.

In *Giraldo*, the Second Circuit relied entirely on its pre-*Bailey* case *United States* v. *Feliz-Cordero*, 859 F.2d 250 (2d Cir. 1988), in holding that a gun transported in a

vehicle must be immediately accessible to be "carried." But *Feliz-Cordero* merely stated that "carry" should be given its literal meaning. The court thought that the literal meaning of "carry," when the "carrying" was done by a vehicle, required the gun to be within reach during the commission of the drug offense. *Feliz-Cordero*, 859 F.2d at 253. The court did not refer to any authority for this proposition and cited to only one case, *United States* v. *Brockington*, 849 F.2d 872 (4th Cir. 1988). *Brockington* does not so much as mention an immediate accessibility requirement, nor does it discuss the meaning of "carry." The only relevance *Brockington* has to this issue is that that panel upheld the "carry" conviction of a taxi cab passenger who had a loaded pistol under the floormat beneath his seat.

The Sixth Circuit in *Riascos-Suarez* inferred the immediate availability requirement from the Supreme Court's admonitions in *Bailey* that "use" must mean more than "possession," *Bailey*, 116 S. Ct. at 508, and that a defendant could not be charged under § 924(c)(1) for mere storage of a weapon, *id.* The easy reach requirement, the *Riascos-Suarez* panel reasoned, is necessary to distinguish "carry" from possession and storage. *Riascos-Suarez*, 73 F.3d at 623.

We disagree. We question the degree to which an easy reach requirement would differentiate "carry" from "possess." More importantly, we agree with the Tenth Circuit that the distinguishing characteristic of "carry" is not the instant availability of the item carried, but the fact that the item is being moved from one place to another by the carrier, either personally or with the aid of some appropriate vehicle. *See Miller*, 84 F.3d at 1260.

The Ninth Circuit's decision in *Staples* relied primarily on its earlier opinion in *United States* v. *Hernandez*, 80 F.3d 1253, 1256-58 (9th Cir. 1996) (holding that a gun in a locked toolbox was not "carried" under § 924(c)(1)), in stating that a firearm had to be immediately available for use to be "carried" in a vehicle. The *Hernandez* panel looked to find the ordinary or natural meaning of "carry." But its quotation from *Webster's* definition of "carry," *supra*, was selective, omitting the definition's references to vehicles. The court also quoted from *Black's* definition of the single phrase, "carry arms or weapons," *supra*, and cited the Sixth Circuit's *Riascos-Suarez* opinion. As we have discussed, however, the ordinary meaning of the term "carry" includes transport by vehicle and affords no basis for imposing an accessibility requirement.

Turning to the case before us, both Cleveland and Gray pled guilty to using or carrying a weapon during and in relation to a drug trafficking offense. They do not now contend, nor could they, that the three loaded handguns found in the trunk of their car alongside rope and duct tape were unrelated to the drug trafficking offense they were committing at the time they were apprehended. In fact, Cleveland admitted at the suppression hearing that he and Gray intended to use the guns to rob the drugs from their suppliers. Their challenge to their convictions on the § 924(c)(1) charge consists solely of the claim that, after *Bailey*, they can not be convicted under the statute's "use" prong and that a conviction under the "carry" prong would require the guns to have been easily accessible. As under the standard definition of "carry" the guns were being "carried," and as we can see no basis for holding that the guns' lack of instant accessibility

precluded them from being "carried," we affirm Cleveland's and Gray's convictions for violations of 18 U.S.C. § 924(c)(1).

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1043
No. 96-1669

UNITED STATES OF AMERICA,

Appellee,

v.

DONALD E. CLEVELAND,

Defendant, Appellant.

No. 96-1128

UNITED STATES OF AMERICA,

Appellee,

v.

RAMON E. VASQUEZ,

Defendant, Appellant.

No. 96-1659

UNITED STATES OF AMERICA,

Appellee,

v.

ENRIQUE GRAY-SANTANA,

Defendant, Appellant.

ERRATA

The published opinion of this Court issued on February 18, 1997, is amended as follows:

Page 4: insert as line 1, the following: "to eight kilograms of cocain from co-defendant Juan Rodriguez"

Page 5: 4th line from bottom: delete comma after "Acosta"

(ORDER LIST: 522 U.S.)

FRIDAY, DECEMBER 12, 1997

CERTIORARI GRANTED

96-1654) MUSCARELLO,
FRANK V. UNITED STATES
)
96-8837) CLEVELAND,
DONALD E., ET AL. V. UNITED STATES

The petition for a writ of certiorari is granted in No. 96-1654. The motion of petitioners for leave to proceed in *form* [sic] *pauperis* and the petition for a writ of certiorari in No. 96-8837 are granted. The cases are consolidated and a total of one hour is allotted for oral argument. The briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 23, 1998. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 20, 1998. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 18, 1998. Rule 29.2 does not apply.
